

BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS

Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:
PETITION OF MID-ATLANTIC PETROLEUM
PROPERTIES, LLC

Petitioner

Carlos Horcasitas
Michael Lenhart
Carl Newberg
Lee Sutherland

For the Petition

Stanley Abrams, Esquire
Attorney for the Petitioner

* * * * *

Martin Klauber, Esquire
People's Counsel for Montgomery County

Neither in Support nor in Opposition

* * * * *

Board of Appeals Case No. CBA-2740-A
(OZAH Referral No. 07-10)

Before: Françoise M. Carrier, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition CBA 2740-A, filed on August 29, 2006, seeks to modify an existing special exception for an automobile fueling station located at 12301 Darnestown Road, Gaithersburg, MD, on property known as Parcel B, Quince Orchard Subdivision (Tax Account Number 06-00395701), which is classified under the C-1 Zone. Petitioner, Mid Atlantic Petroleum Properties, LLC, seeks to renovate the site by increasing the number of pumping stations, expanding the size and hours of the convenience store, eliminating the service bays and adding a car wash.

On October 17, 2006 the Board of Appeals (“Board”) scheduled a public hearing in this matter for January 19, 2007, to be conducted by a hearing examiner in the Office of Zoning and Administrative Hearings. Technical Staff of the Maryland-National Capital Park & Planning Commission (“M-NCPPC”) reviewed the petition and, in a report dated December 26, 2006 (the “December Staff Report”), recommended approval with conditions.¹ See Ex. 17. The Montgomery County Planning Board (“Planning Board”) considered this petition on January 11, 2007 and recommended approval. See Ex. 22. Soon thereafter, however, the Hearing Examiner discovered that although Petitioner had submitted a traffic study indicating that the proposed modification would adversely affect traffic conditions at a congested intersection, and proposed to make a payment in lieu of constructing roadway improvements, the Staff Report did not include any traffic analysis. When this oversight was brought to Staff’s attention, Staff began its traffic review, including forwarding pertinent materials to the State Highway Administration (“SHA”).

The January 19, 2007 hearing was convened briefly, but no evidence was offered. Instead, Petitioner requested to postpone the hearing until such time as Technical Staff and the Planning Board would have the opportunity to review the traffic study and consider Petitioner’s proposed mitigation payment. The new hearing date announced from the bench was March 29, 2007. When it became apparent that the Planning Board and its staff would not be able to complete their review before that day, the hearing was rescheduled to April 13, 2007. See Ex. 20.

¹ The Staff Report has been liberally paraphrased and quoted in Part II of this report.

Technical Staff submitted a second staff report, devoted entirely to analyzing the traffic impacts of the proposed use, on March 21, 2007 (the "March Staff Report"). Staff recommended that the special exception be approved with a condition requiring Petitioner to construct intersection improvements to mitigate its traffic impacts, rather than paying a fee. The Planning Board considered this matter a second time at its meeting on April 5, 2007, and voted to recommended approval.² The Planning Board, however, recommended that the special exception be granted on condition that Petitioner make an additional payment equal to an extra 50 percent of the applicable impact tax, in lieu of making actual roadway improvements. See Ex. 23. As explained in a later memorandum from Technical Staff, the Planning Board did not find that a reasonable nexus existed between the very small increase in intersection congestion that the proposed modification would generate and Technical Staff's proposed construction solution. See Ex. 24.

The hearing was convened on April 13, 2007 after proper notice, at which time testimony and other evidence were offered in support of the petition. No opposition was expressed at the hearing, nor is any reflected in the record. The record was held open for supplemental submissions by Petitioner, and was later re-opened to allow additional submissions. The record finally closed on July 5, 2007.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c) of the Zoning Ordinance. Section 59-G-1.3(c)(4) states:

The public hearing must be limited to consideration of the proposed modifications noted in the Board's notice of public hearing and to (1) discussion of those aspects of the special exception use that are directly related to those proposals, and (2) as limited by paragraph (a) below, the underlying special exception, if the modification proposes an expansion of the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less.

(A) After the close of the record of the proceedings, the Board must make a determination on the issues presented. The Board may reaffirm, amend, add to, delete or modify the existing terms of the special exception. The Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise and screening requirements of 59-G-1.26, if (1) the proposed modification expands the total floor area of all structures or buildings by more than 25 percent, or 7,500 square

² The transmittal letter indicates that four members of the Planning Board voted in favor of the recommendation of approval. It does not indicate whether the fifth member was absent or voted against. See Ex. 23.

feet, whichever is less, and (2) the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.

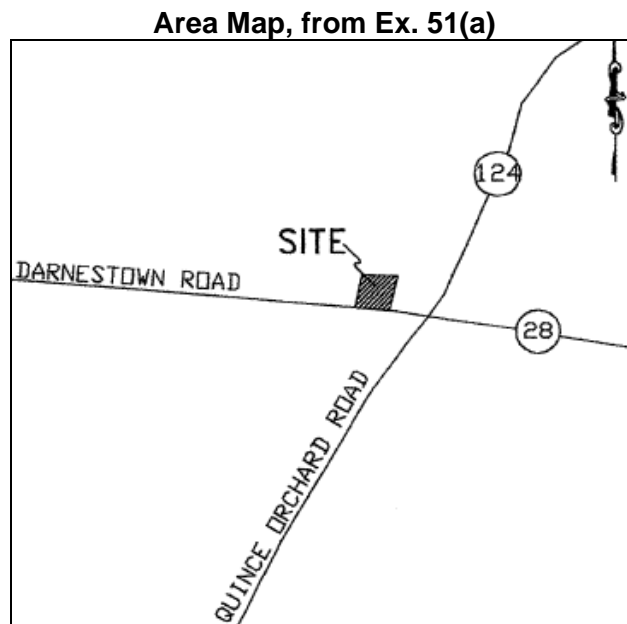
In the present case, Petitioner seeks to more than double the size of the convenience store. Moreover, the proposed modification involves replacing substantially all of the structures and equipment associated with the use, and making significant changes in the operation of the use. Accordingly, the entire operation was considered at the hearing and is reviewed in this report.

II. BACKGROUND

For the convenience of the reader, background information is grouped by subject matter.

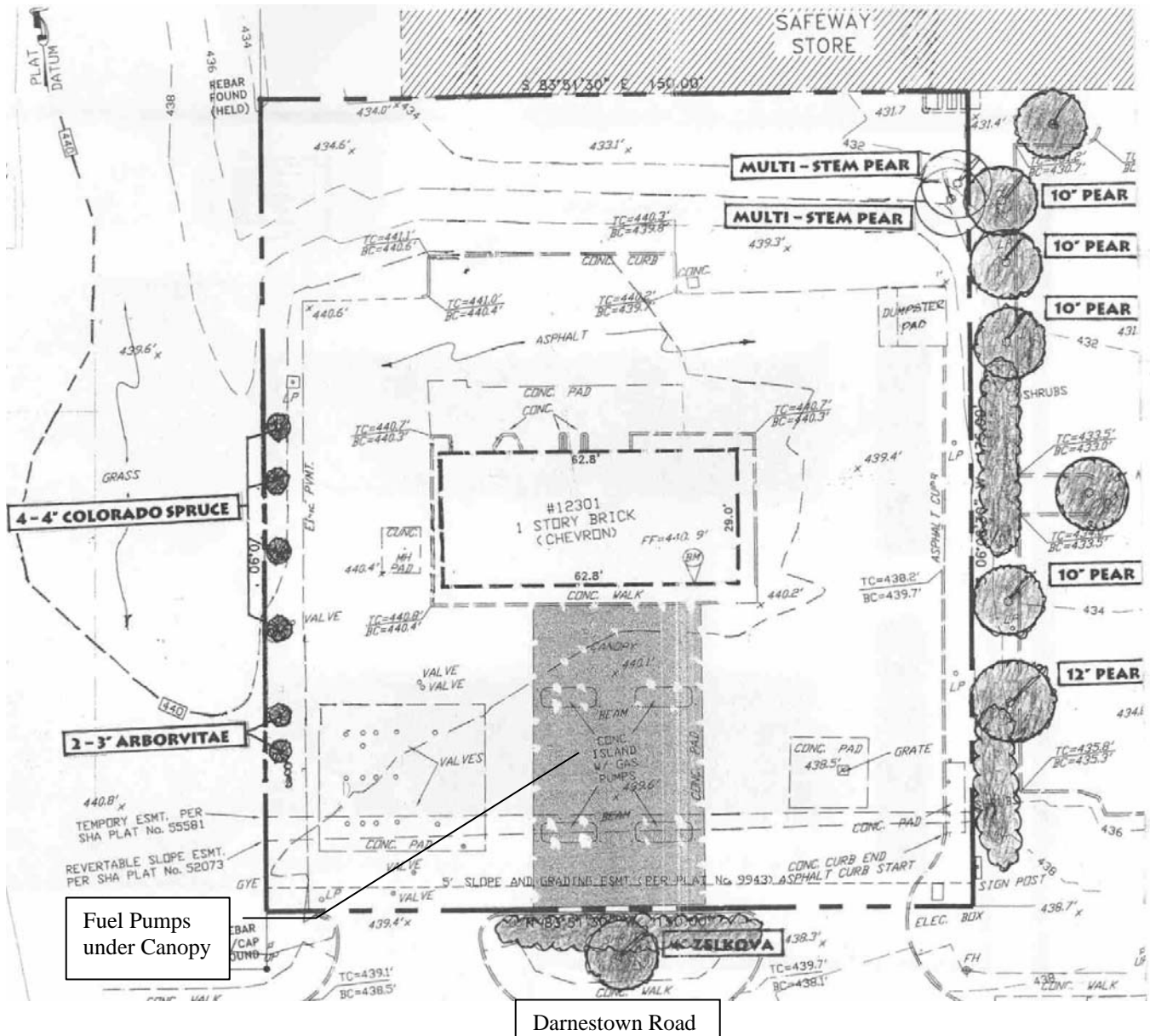
A. The Subject Property and Neighborhood

The subject property consists of 26,250 square feet of land located at 12301 Darnestown Road in Gaithersburg, approximately 700 feet west of the intersection of Darnestown Road (MD Rte. 28) with Quince Orchard Road (MD Rte. 124). The property is classified under the C-1 Zone (Convenience Commercial), is rectangular in shape (nearly square) and slopes slightly upwards toward the north (rear) side of the site. Its general location may be seen on the area map below.



The subject site has been the site of a gasoline filling station since 1970 or 1971. It has pump islands covered by a canopy and a colonial-style, brick building with a small cashier stand/office/convenience store and three service bays opening to the rear of the property. The property has ten parking spaces, with trash pick-up behind the building. An Existing Conditions is shown below.

Existing Conditions Plan, Ex. 30(b)



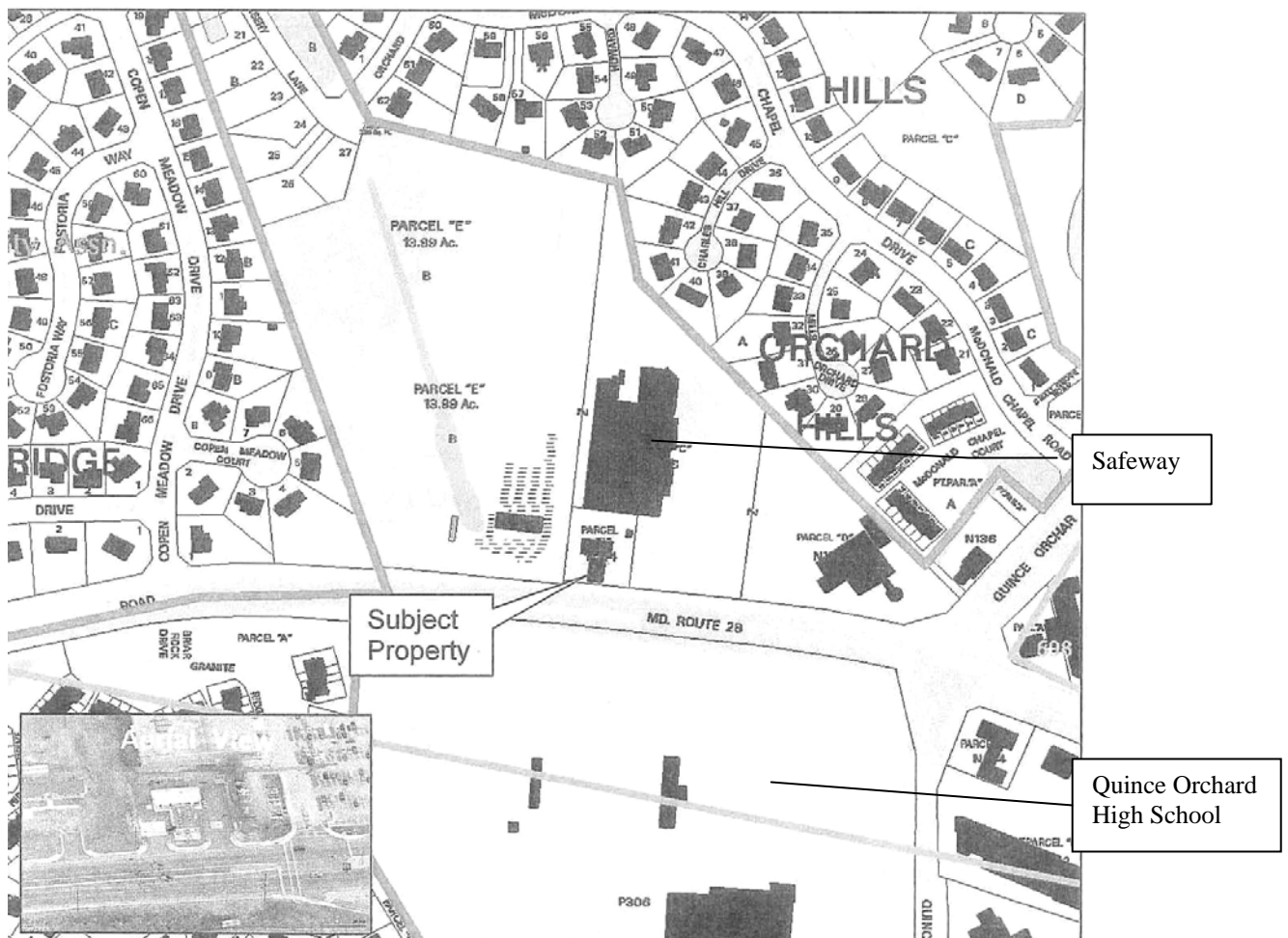
The subject site is surrounded on two sides, to the north and east, by a Safeway shopping center and its parking, also in the C-1 Zone. The south face of the Safeway building sits on the subject property's northern property line, and on the eastern property line, only a landscaping strip (on the Safeway side) separates the gas station from the shopping center parking. Farther east on

Darnestown Road, next to the shopping center parking lot and stretching to Quince Orchard Road, is the former location of a Johnson's Flower and Garden Center, in a C-1 Zone, which is expected to be replaced with a bank. Around the corner on Quince Orchard Road, in a C-1 Zone, is an existing bank. Across Quince Orchard Road is a former Exxon gas station that was recently closed. The southeast corner of the intersection has additional C-1 Zone property with a gas station on the corner, surrounded by a shopping center.

Directly across Darnestown Road from the subject site is Quince Orchard High School, which extends to the southwest quadrant of the Darnestown Road/Quince Orchard Road intersection. The main school entrance shares a traffic light with the main entrance to the Safeway shopping center adjacent to the subject site. The school site is zoned R-200.

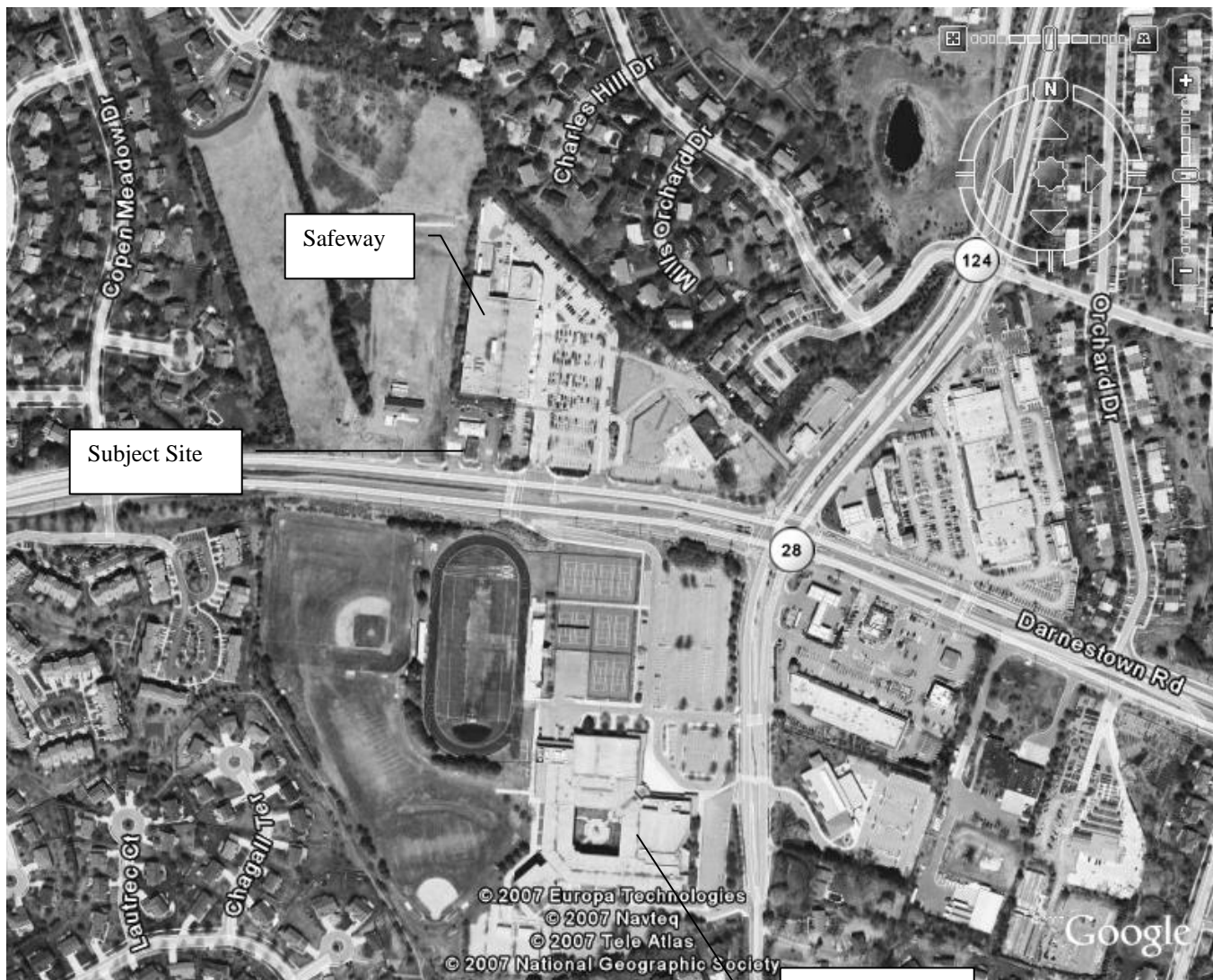
To the west, the subject site abuts a large property owned by Johnson Family Enterprises, LLC which also owns the property that is the subject of this modification petition. Johnson Family Enterprises, which leases the subject site to Petitioner, has consented to the transfer of the subject special exception to Petitioner, and to the modification of the special exception to add a car wash and make other changes. See Ex. 13. The adjacent Johnson's property is classified under the R-200 Zone and is the subject of an approved special exception. The current use of the site is modest, with only a single, small storage building. The special exception was modified in early 2006 to permit Johnson's to transfer to this site the garden center that was, at the time, located at the corner of Darnestown and Quince Orchard Roads. This modification, which would considerably intensify the use of the site, has not yet been implemented.

The closest residential neighborhood to the subject site is located just west of the Johnson's special exception site, in an R-200 Zone. Residential neighborhoods in the R-200 Zone are also located north of the Safeway shopping center, the Johnson's special exception site and the corner commercial property. Additional residential neighborhoods, classified under the R-200/TDR Zone, are located west and south of Quince Orchard High School. The relationship of the subject property with nearby land uses may be seen in the vicinity map and aerial photograph that follow.

Subject Site and Immediate Surroundings, excerpted from December Staff Report at 3**Closer View of Subject Site, excerpted from December Staff Report Attachment 1**

Technical Staff described the general neighborhood for this site as including properties in the area of Copen Meadow Drive to the west, including Copen Meadow Court, McDonald Chapel Drive to the north, Quince Orchard Road and the C-1 properties to the east, and properties along Darnestown Road that are across from the subject property, including Quince Orchard High School. The Hearing Examiner considers this to be an appropriate neighborhood description for purposes of this case. The relationship of the subject site to uses in this general neighborhood may be seen on the aerial photograph below.

Aerial Photograph Downloaded from Google Earth³



³ The Hearing Examiner downloaded the photograph above to update a Google Earth photograph provided by Petitioner, and to obtain the electronic file for higher reproduction quality. The Hearing Examiner hereby takes official notice of Google Earth's widely recognized mapping capabilities.

B. Land Use History

The Board of Appeals granted the subject special exception to The American Oil Company in March, 1970. The special exception was transferred to the present petitioner, with certain modifications, on June 20, 2006.⁴ The subject property was zoned C-2 at the time of the original special exception grant, but was reclassified to the C-1 Zone by a subsequent Sectional Map Amendment.

C. Master Plan and Overlay Zone

The subject property is in the Smokey Glen Study Area of the *1985 Gaithersburg Vicinity Master Plan* (the "Master Plan"). The Master Plan confirms C-1 zoning for the subject site, which permits an automobile filling station by special exception. Technical Staff notes that the subject site was once part of larger tracts of land owned by Johnson Enterprises, and that much of the surrounding area has been developed with commercial uses and single-family housing as recommended in the Master Plan. The Master Plan provides no direct guidance concerning special exceptions, but Technical Staff considers the proposed modification to be consistent with the Master Plan's land use objectives.

D. Proposed Modification

Petitioner requests approval to replace all of the physical structures on the site and provided expanded services, as described below.

Fueling and Related Services. The subject gas station currently has two pump islands with a total of four gas pumps and eight fueling stations, under a canopy measuring approximately 65

⁴ The 2006 modification was spurred by a January, 2003 Notice of Violation that cited Petitioner for a missing five-foot hedge; non-permitted banners, flags and signs; a non-permitted storage shed; non-permitted appliances such as a telephone, vacuum and air pump; and several non-permitted dumpsters at the rear of the property. See BOA Opinion effective June 20, 2006, attached to Exhibit 3. Petitioner removed the signs and banners and removed the roof from the shed so that it was no longer considered a shed. Following a show cause hearing, the Board approved a revised, as-built site plan that removed the requirement for a hedge along the eastern property line, given that there are no longer any residences to the east; approved the air pump, vacuum machine, charity clothes box and dumpsters; and approved the transfer of the special exception to Petitioner.

by 35 feet. The distance between the front property line and the closest pump is approximately 15 feet. Petitioner proposes to remove the existing pump islands and dispensers and replace them with three pump islands containing two gas pumps each, for a total of 12 fueling stations. The new pump islands would be covered by a canopy measuring 40 by 80 feet. The distance between the front property line and the closest pump would be approximately 30 feet.

Two vacuum stations and one air pump would be provided along the west side of the property. The existing service bays would be removed and would not be replaced.

Convenience Store. Petitioner proposes to remove the existing building housing the cashier's office, convenience store and service bays, which sits roughly in the middle of the site and contains 1,625 square feet of space. The new convenience store building would be farther back on the site, with 2,924 square feet of space, including 2,600 square feet of retail space. The convenience store would be accessible both from the front and, for car wash customers, from the rear. An ATM machine would be installed on the front of the building. Mr. Horcasitas testified that the convenience store would offer carry-out food including freshly made sandwiches and pizzas.

Car Wash. Petitioner proposes to add a car wash to the site, to be housed in a 65 by 25-foot building attached to the rear wall of the convenience store. Because of its location and size, the car wash building would not be visible from the street. The building would be constructed of block and cultured stone materials. Vehicles would enter the car wash in the northeast corner of the site, using a dedicated car-wash lane. Expert testimony and exhibits indicate that there would be room for six vehicles to line up without reaching the gas station part of the site, and then alongside the pumps there would be room for another three or four vehicles without blocking MD 28. See Master Site Plan reproduced on page 14; Tr. at 129-130. The site plan shows a 20-foot drive aisle between the pump islands and a row of parallel parking spaces along the eastern property line, which allows for two-way traffic. Thus, even if the line for the car wash extended to the pumps, there would still be room for vehicles to enter the site and get to the gas pumps.

After entering the car wash, vehicles would be pulled through by a conveyor system and exit in the northwest corner. The view of the exit from the adjacent property to the west would be screened by a retaining wall topped by a six-foot fence and landscaping. Petitioner represents that approximately 90 to 95 percent of the water used in the car wash would be recycled and used again.

Hours of Operation and Employees. The existing gas station currently operates from 6:30 a.m. to 11:00 p.m. seven days a week. Petitioner proposes the following hours:

Auto filling station and convenience store: 6:00 a.m. to midnight, seven days a week
Car wash: 7:00 a.m. to 8:00 p.m., seven days a week

The existing gas station has four employees. Petitioner proposes to increase the number of employees to accommodate the increase in hours and in services and facilities offered. Employees would work in three shifts, with a maximum of three employees per shift. Petitioner's Prehearing Statement requests approval for seven employees, to work in three shifts as follows:

Shift #1: 3 employees
Shift #2: 3 employees
Shift #3: 1 employee

This request was made based on the original request to increase the hours of operation to 24 hours a day/seven days a week for the gas station and the convenience store. The Petitioner reduced the requested hours of operation at the hearing to 6:00 a.m. to midnight, but did not address employees. Logic suggests that the third shift listed in the Prehearing Statement was intended to cover the middle of the night hours, when traffic volumes would be lower. Nonetheless, it is possible that Petitioner might have three employee shifts in an 18-hour day, so the Hearing Examiner recommends approval of the number of employees requested.

Parking. Petitioner proposes to replace the existing ten parking spaces with 17 new spaces. Eleven spaces would be provided as head-in parking in a single row in front of the convenience store, and three parallel parking spaces would be striped on each side of the site, alongside the fuel pumps. The parallel parking spaces on the west side of the site would be adjacent to the vacuum and the air pump. The 17 spaces proposed fall one short of the 18 spaces that would normally be required under Section 59-E-3.7 of the Zoning Ordinance, calculated as follows:

3 employees in largest shift = 4 spaces
2 spaces for car wash
<u>+ 13 spaces for convenience store</u> (5 spaces for every 1,000 square feet of retail space)
18 spaces required

Petitioner requests a waiver to permit 17 spaces instead of 18. Petitioner's counsel, Stanley Abrams, acknowledges that a plain reading of Section 59-E-3.7 requires two spaces for the car wash. Mr. Abrams argues that this requirement was intended for older car washes where one bay was reserved for hand-washing of vehicles by employees, whereas a modern car wash, such as proposed in this case, is automated.⁵ See Ex. 47. Nonetheless, Petitioner has requested a waiver due to the existing language of Section 59-E-3.7. The relevant text of Section 59-E-3.7 is quoted below:

Off-street parking space must be provided as follows:

Automobile filling station. Two parking spaces for each car wash bay, grease bay or similar service area, and one parking space for each employee.

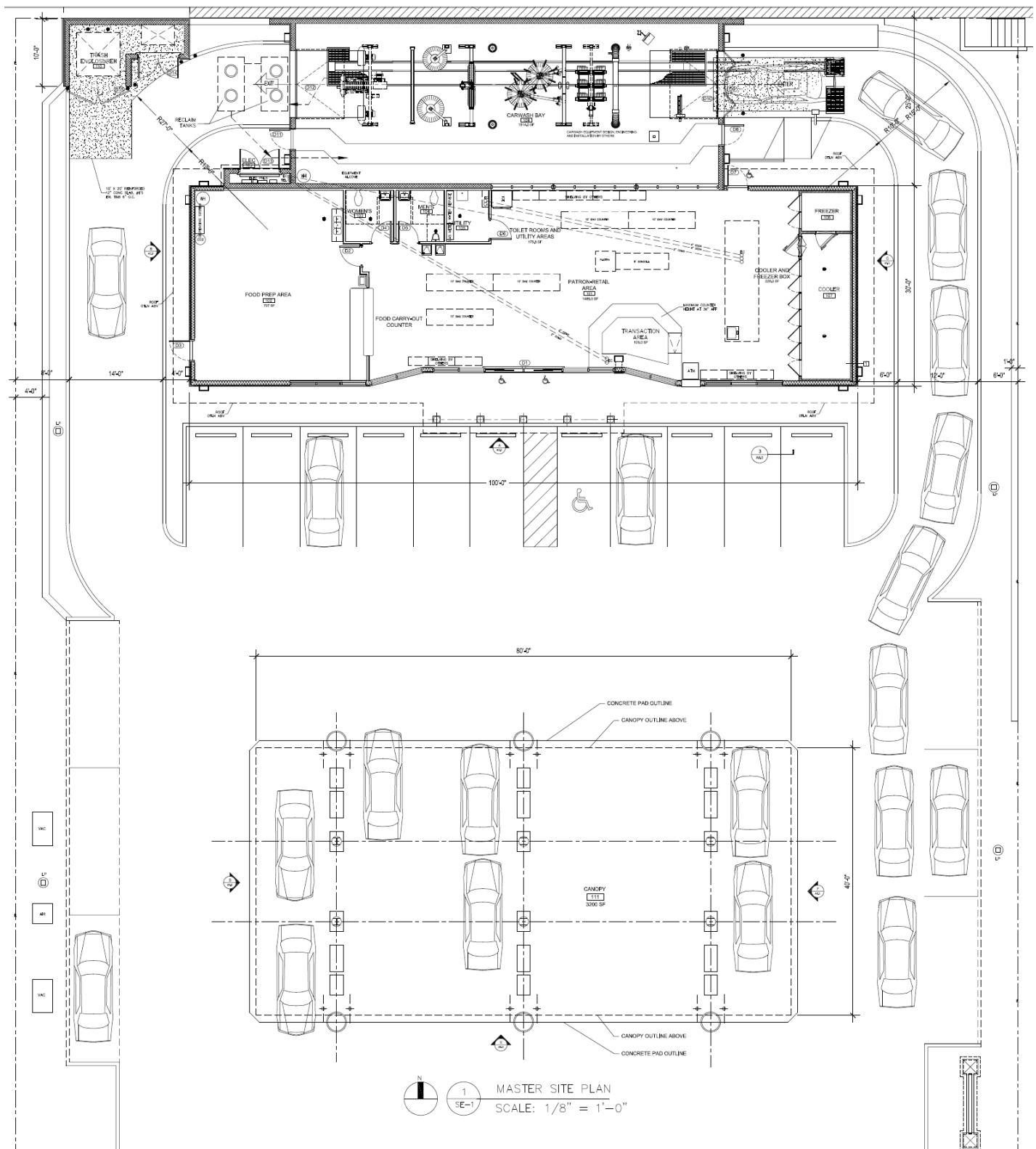
Technical Staff did not address the requested waiver of one parking space because the request was made after the hearing. Staff found, however, that the 17 spaces proposed would be adequate for the use. See December Staff Report at 11. Mr. Abrams argues that the waiver should be granted (i) based on Staff's recommendation; (ii) because the proposed car wash would be patron controlled upon payment of the fee to a cashier and/or use of a token or card by the patron, therefore generating no additional employee parking; and (iii) because there is no space available on site to create an additional parking space. See Ex. 47.

As discussed under Part II.F. below, Petitioner also seeks a waiver of applicable side setback requirements with regard to on-site parking. The waiver requests are discussed in Part IV.

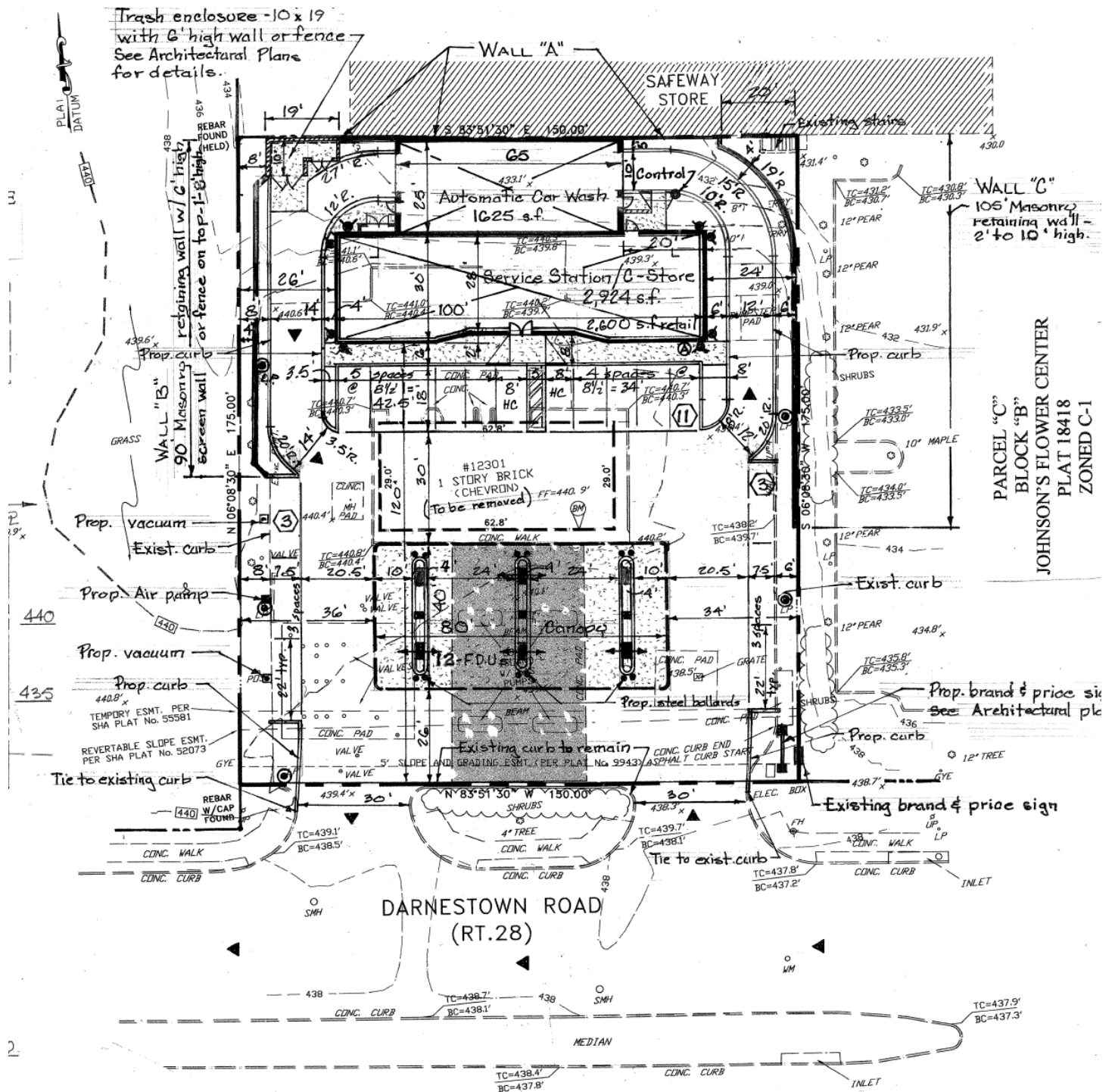
Submitted Plans. The graphic shown on the next page is a "Master Site Plan" prepared by Petitioner's architect, which provides a very clear presentation of the proposed layout. This is followed by the Site Plan prepared by Petitioner's land planner, which is visually confusing but contains important elements such as a development standards table. Both are considered binding on Petitioner.

⁵ It is not obvious to the Hearing Examiner why the old-fashioned car wash bay would require additional parking, because employee parking is provided separately. The two parking spaces may have been to provide a place for a second vehicle to wait while another car was being washed. With an automated car wash, cars do not park in a parking space while waiting, they simply line up behind the entrance to the car wash tunnel.









Master Site Plan, Ex. 10(a)



Site Plan, Ex. 51(a) (main graphics only, other elements on following pages)



Site Plan Legend, from Ex. 51(a)

<u>LEGEND</u>	
	Building mounted light
	Air pump
	Site pole light
	Vacuum
	Vehicular traffic direction
	Proposed concrete paving
	ATM location
	Number of parking spaces

Site Plan General Notes, from Ex. 51(a)

GENERAL NOTES

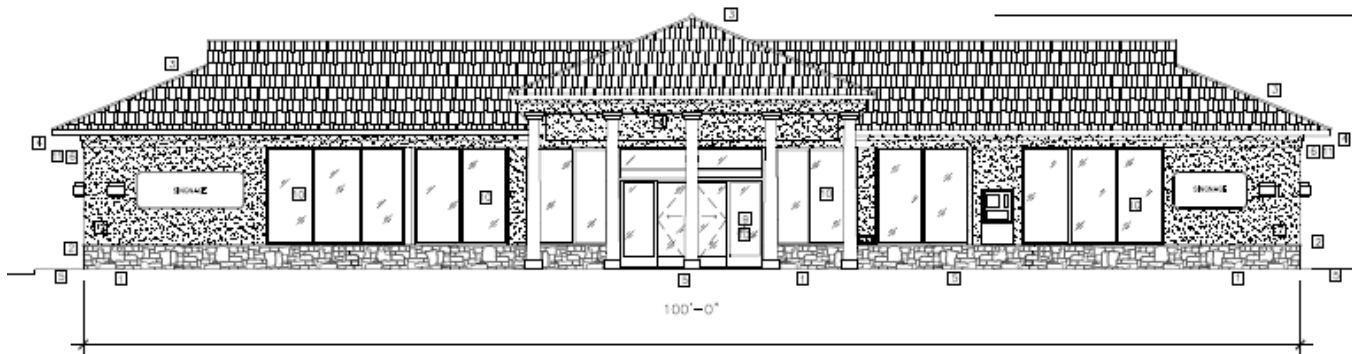
- 1.) Property reference: Parcel "B", Johnson's Flower Center, recorded in Plat 9943 - Deed: L. 26885 / F. 277.
- 2.) Property area = 26,250 sq. ft. or 0.603 acres.
- 3.) Zoned: C-1. (Zoning Map: 221NW12). With a Special Exception for "Automobile Filling Station" - CBA- 2740 (1970). Use to continue with modifications.
- 4.) Tax account # = 06-00395701
- 5.) Tax map = ES 52, N 144
- 6.) Property address = 12301 Darnestown Road, Darnestown, Md. 20878
- 7.) Utilities:
 - A.) WSSC 200 sheet # = 221 NW 12
 - B.) Public water supply - W-1
 - C.) Public sewer - S- 1
 - D.) Electric, gas, telephone and cable TV available.
- 8.) Boundary and topography shown on this plan are from a survey by Potomac Valley Surveys, Poolesville, Md.
- 9.) Approved preliminary Plan # 1-85102.
- 10.) ADC Map # = map 18, grid Gx13
- 13.) Watershed = Great Seneca Creek, Tributary B- 24.
- 14.) Special Protection Area ? No
- 15.) Soils map = 18 of 28
- 16.) Soils = 2B
- 17.) Planning Area = Gaithersburg and Vicinity - PA # 20.
- 18.) Property owner: Johnson' Family Enterprises, LLC
10315 Kensington Parkway
205
Kensington, Md. 20895-3358
- 19.) Property operator: Mid Atlantic Petroleum Properties
12311 Middlebrook Road
Germantown, Md. 20874
Phone: 301-972-4116
- 20.) There are no 100 year flood plains, flowing streams, natural wetlands, critical habitats, rock outcrops, forests, woodlands, or historic features on this site.
- 21.) There is no qualifying forest or specimen trees on this site.
- 22.) No rare, threatened or endangered plant or animal species were observed on the property.

Site Plan Development Data Table, from Ex. 51(a)

ITEM	REQUIRED	EXISTING	PROPOSED
Lot area	N/A	26,250 sq.ft. or 0.603 ac.	Same
Zone	C-1 with Special Exception	C-1 with Special Exception	Same
Building Coverage	N/A	1,821 sq. ft. or 6.9%	4,549 sq. ft. or 17.3%
Paving Coverage	N/A	16,628 sq. ft. or 63.3%	17,656 sq. ft. or 67.3%
Total impervious area	90.0% maximum or 23,625 sq. ft.	18,449 sq. ft. or 70.3%	22,205 sq. ft. or 84.6%
Green area	10.0% minimum or 2,625 sq. ft.	7,801 sq. ft. or 29.7%	4,045 sq. ft. or 15.4%
Height	30' maximum	19'	20'
Canopy	N/A	2,272 sq. ft. or 8.7%	3,200 sq. ft. or 12.2%
SETBACKS			
Front	10' minimum	68'	120'
Side	0' or 10' min. East side 12' min.- West side *	37' & 87'	24' & 50'
Rear	0' or 10' min.	76'	0'
PARKING			
Required	1 per employee 2 per service or wash bay. 5 per 1,000 sq. ft. retail uses.	4 employees = 4 sp. 3 service bays x 2 = 6 spaces 0 (no retail)	3 employees = 3 spaces car wash = 2 spaces 2,600 sq. ft. retail 2,600/1,000 x 5 = 13
Total		+ 10 spaces	+ 18 spaces +
Provided		12 spaces	17 spaces +
* If adjacent property is zoned residential, those set backs apply. Parcel to the west of the subject site is zoned R- 200. Property to east and north is zoned C-1.			
+ Waiver requested for one (1) space.			
Note: Trash and re-cycling pick ups will require the car wash to be temporarily closed while trash truck is positioned at the trash enclosure.			

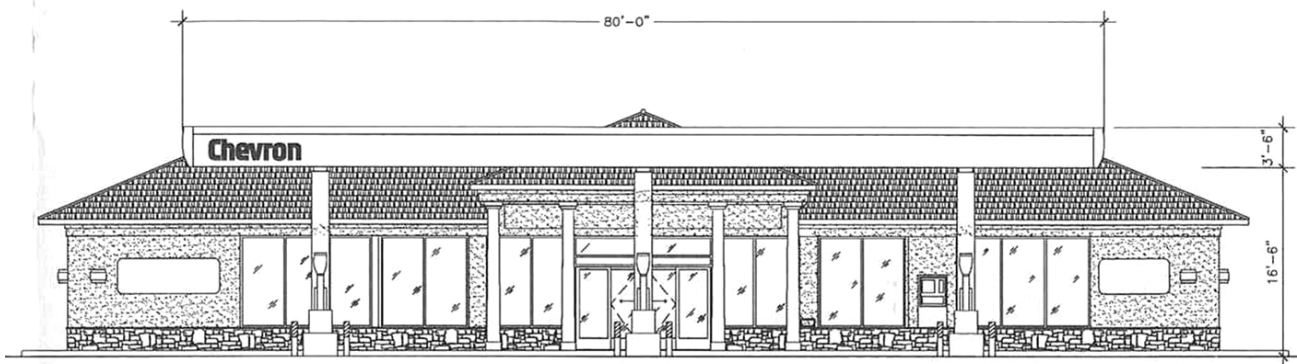
In addition to the Master Site Plan and Site Plan, Petitioner submitted building floor plans and elevations, which are reproduced below and on the next page.

Convenience Store Elevation, from Ex. (9e)

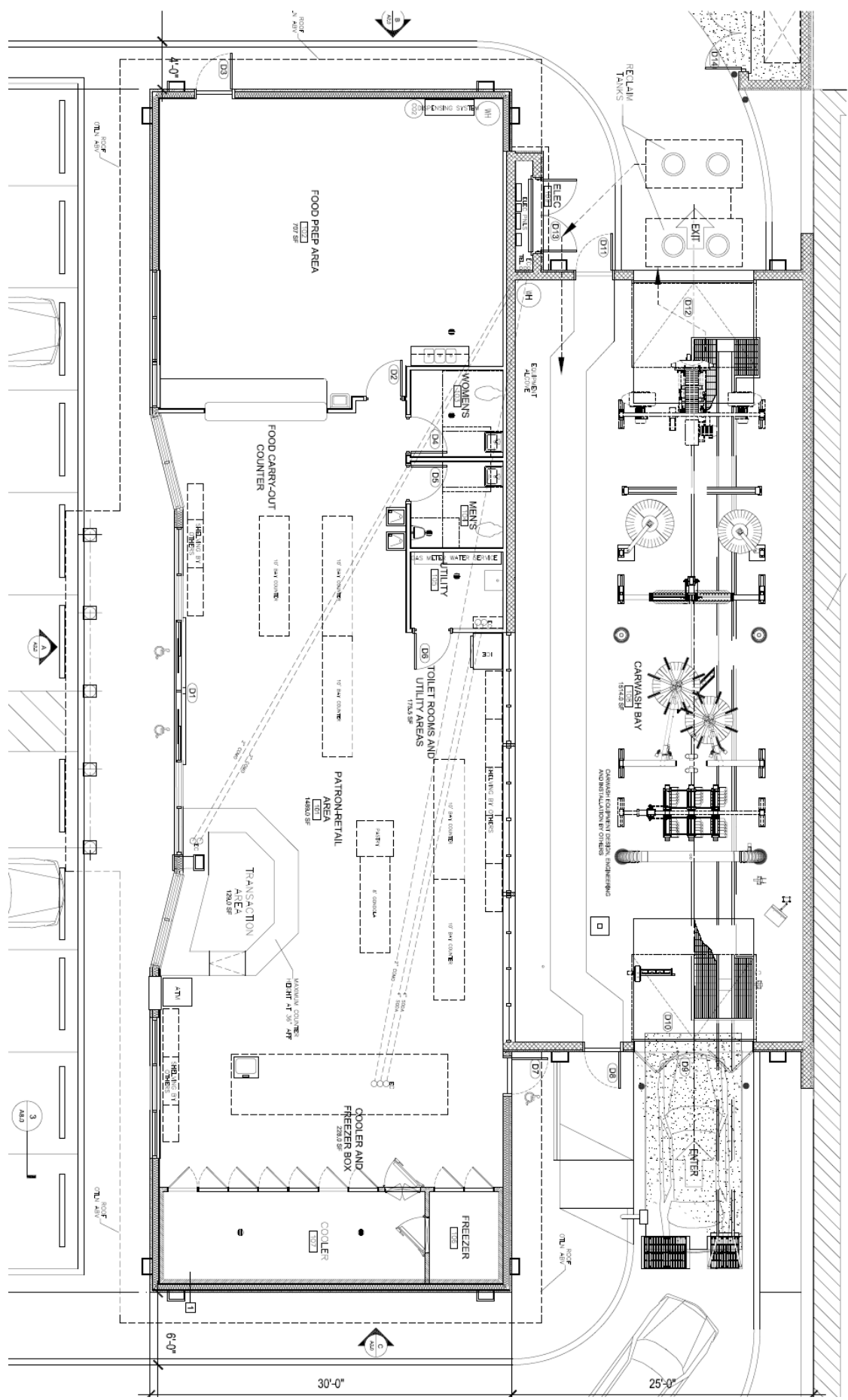


FRONT ELEVATION — SOUTH

Convenience Store with Canopy in Front, from Ex. (9(d))



FRONT ELEVATION — EAST











Building Floor Plan, from Ex. 9(c)

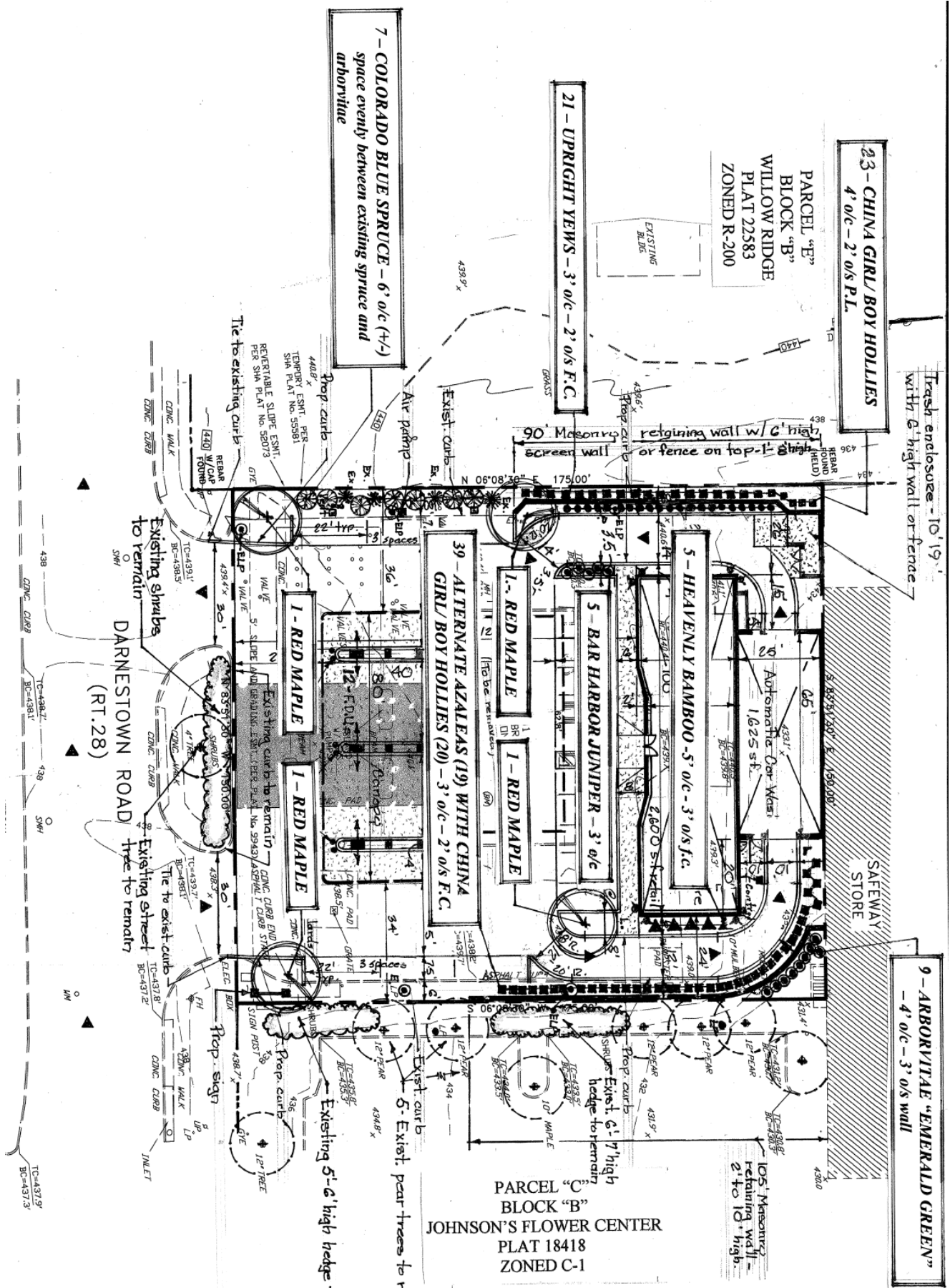
E. Landscaping, Lighting and Signage

The subject site currently has almost no landscaping. Petitioner proposes to add four red maples, two at the front of the site and two near the front of the convenience store, as well as evergreen trees and shrubs along the entire western property line (which abuts property zoned for residential use) and the portion of the eastern property line from the rear of the site past the parking spaces in front of the convenience store. The landscape plan is reproduced below and on the following pages.

Landscape Plan: Plant List, from, Ex. 51(b)

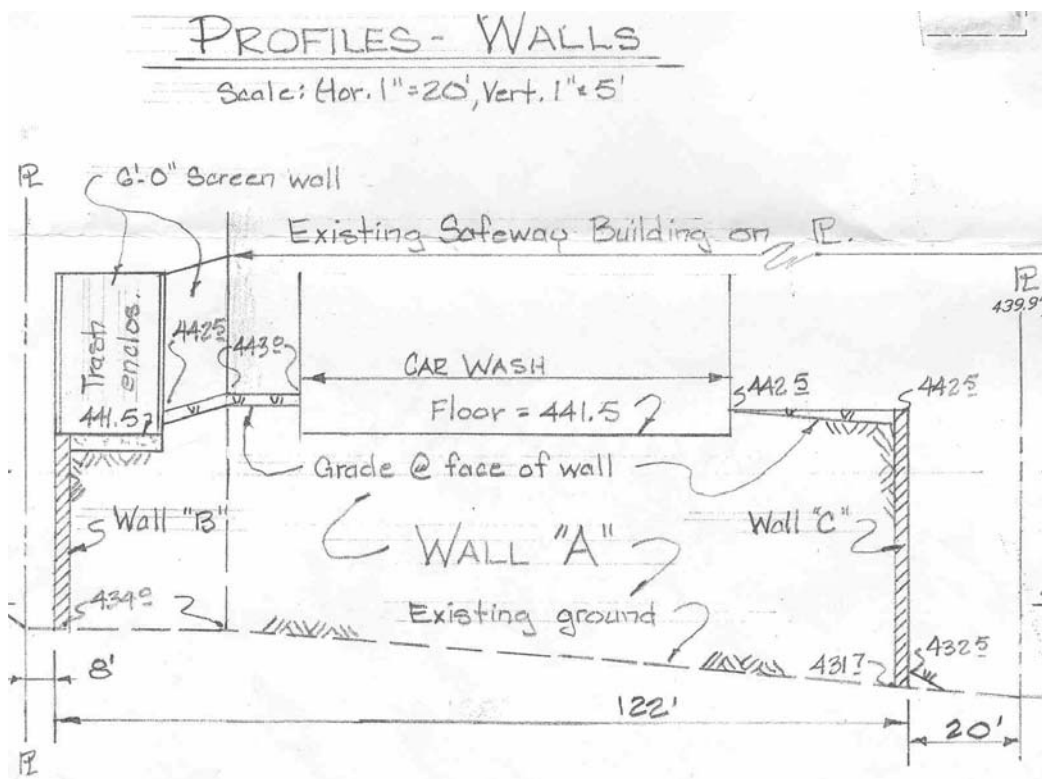
<i>PLANT LIST</i>		
<i>ITEM</i>	<i>NUMBER</i>	<i>REMARKS</i>
<i>RED MAPLE</i> <i>(acer rubrum)</i> 	4	<i>2-1/2" CAL</i> <i>b & b</i>
<i>ARBORVITAE-</i> <i>Emerald green</i>  <i>(thuja occ. Emerald green)</i>	9	<i>5' to 6'</i> <i>b & b</i>
<i>AZALEAS – "GLEN DALE"</i> <i>(rhododendron 'Glen Dale'</i> <i>red and white)</i> 	19	<i>3 gal container</i>
<i>HOLLIES - CHINA</i> <i>GIRL/ BOY</i>  <i>(ilex cornuta – china</i> <i>girl & china boy)</i>	43	<i>3 gal. container</i>
<i>UPRIGHT YEW</i>  <i>(taxus columnaris)</i>	21	<i>3 gal. container</i>
<i>COMPACT HOLLIES</i> <i>(ilex crenata helleri)</i>	30	<i>3 gal. container</i>
<i>BAR HARBOR JUNIPER</i>  <i>(juniperus horizontalis-</i> <i>'Bar Harbor')</i>	5	<i>2 gal. container</i>
<i>COLORADO BLUE</i> <i>SPRUCE (Picea pungens</i> <i>Glauc)</i> 	7	<i>5' -6' b & b</i>
<i>HEAVENLY BAMBOO</i>  <i>(Nandina domestica)</i>	5	<i>3 gal. container</i>

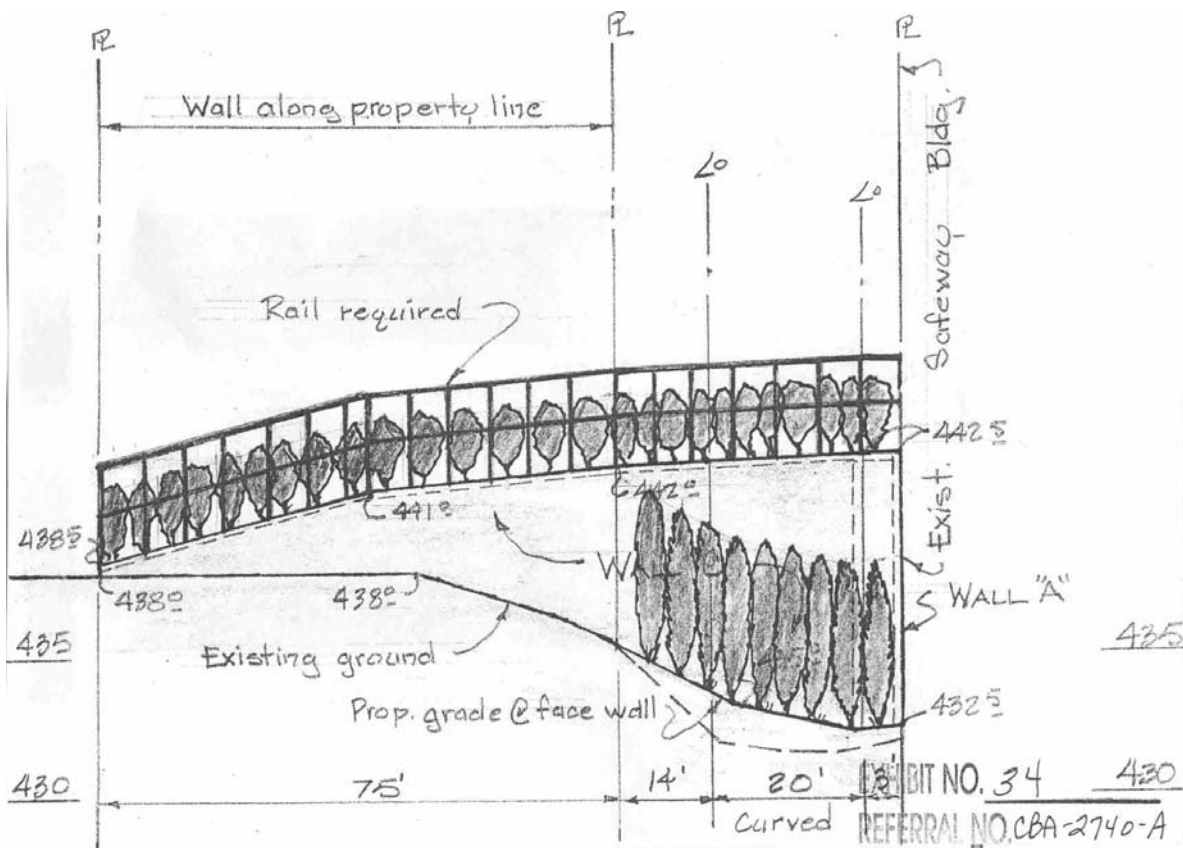
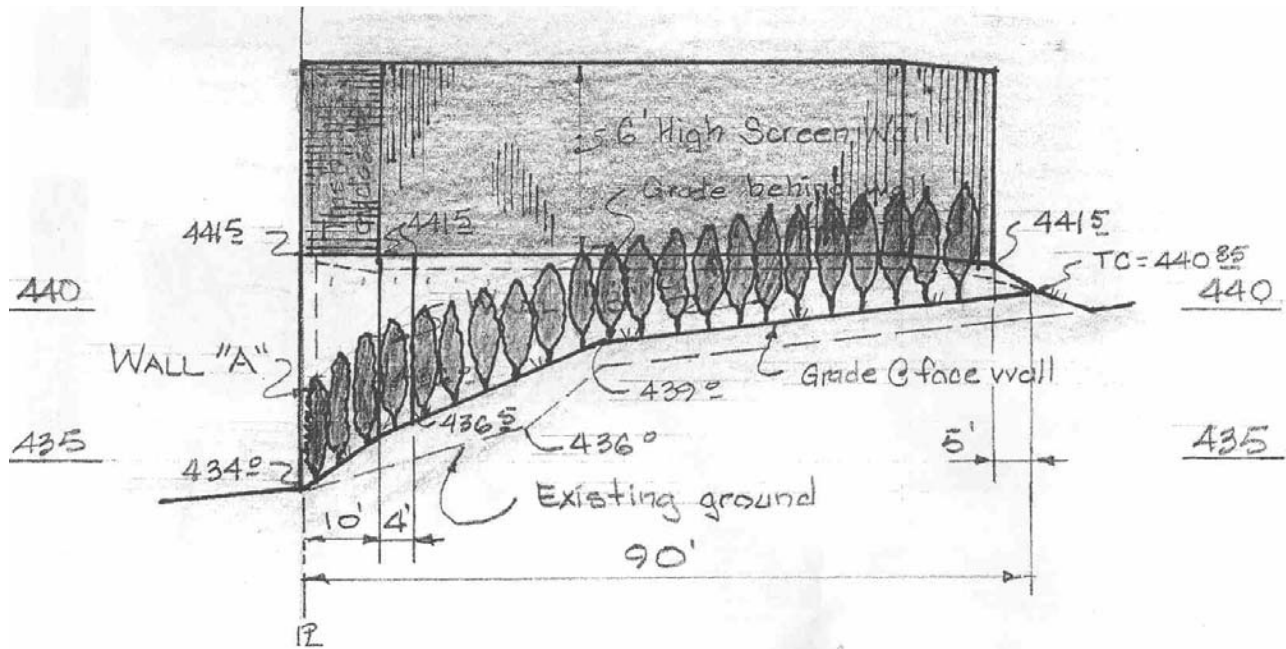
Landscape Plan Graphics, from Ex. 51(b)



Petitioner also proposes to install masonry retaining walls on the rear property line (behind the car wash) and on each of the side property lines. On the west side of the site, the retaining wall would extend 90 feet from the rear property line. On the east side, it would extend 105 feet from the rear property line. These walls are necessary due to steep slopes at the rear of the site and the grading of the Safeway store site. See Tr. at 74. Petitioner plans to install six-foot screening fences, which Petitioner's land planner described as "sight-tight" wooden fencing, on top of Walls B and C, along the western and eastern property lines, respectively. These walls would be additionally screened, as shown in the drawings below, by evergreens planted at both the top and the bottom of the walls.

Site Plan Retaining Wall Profiles, from Ex. 34





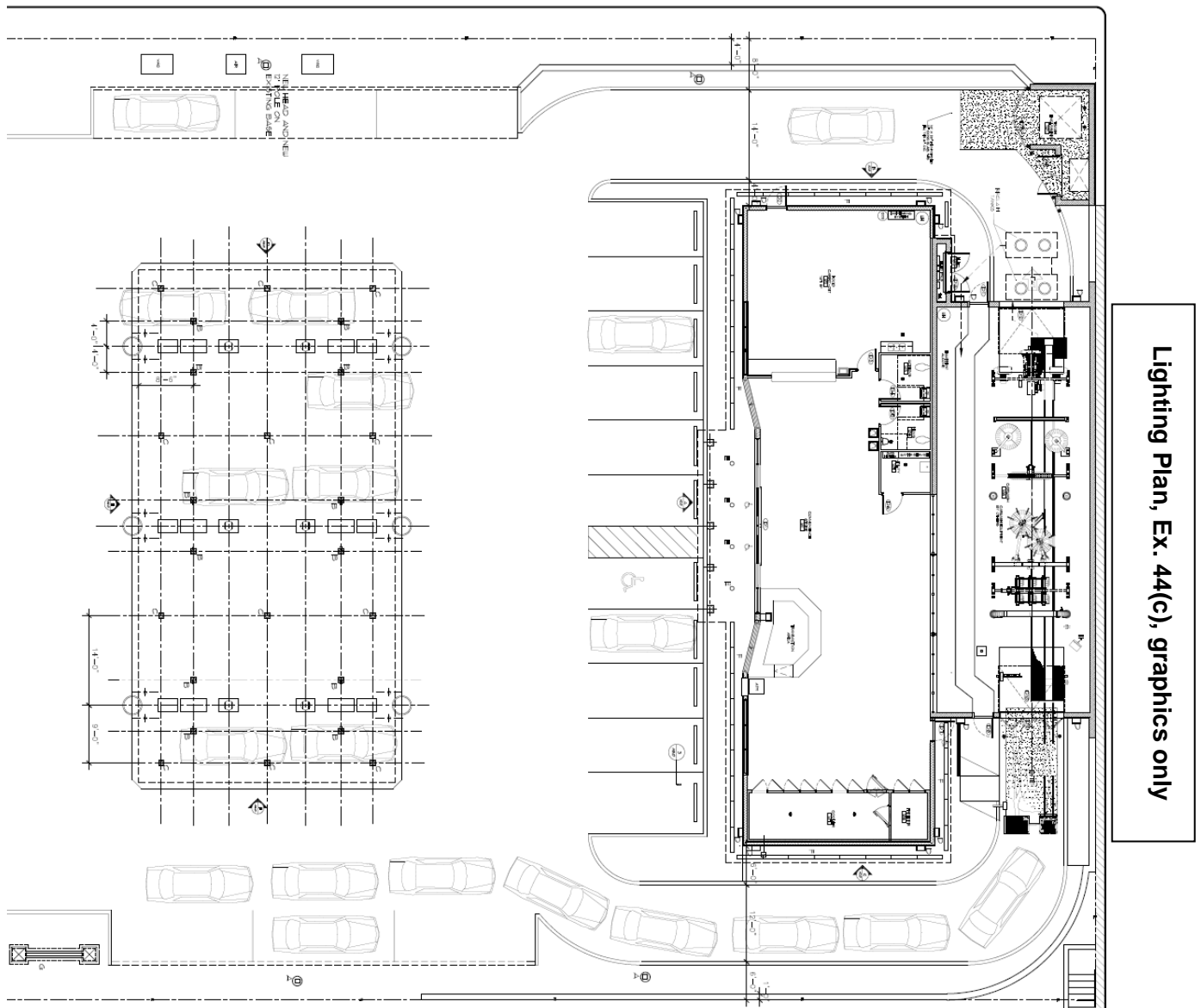
As discussed in Part IV.B, however, Petitioner's landscaping proposal fails to comply with one of the specific conditions for the use, Section 59-G-2.06(b). That section explicitly requires that a gas station abutting a residential zone must be screened "by a solid wall or a substantial, sightly,

solid fence, not less than 5 feet in height, together with a 3-foot planting strip on the outside of such wall or fence, planted in shrubs and evergreens.” Petitioner’s Landscaping Plan complies with this requirement where a retaining wall is proposed along the western side of the site, but nothing in the evidence suggests that screening of this kind is proposed for the front half of the site. Accordingly, the recommended conditions require, before the special exception may take effect, that Petitioner submit a revised Landscape Plan and Site Plan clearly showing a “solid wall or a substantial, sightly, solid fence, not less than 5 feet in height, together with a 3-foot planting strip on the outside of such wall or fence, planted in shrubs and evergreens,” along the portion of the western property line not screened by the proposed retaining wall.

With regard to exterior lighting, Petitioner proposes an internally-lit, low monument sign and two types of lights under the canopy: a focused, directional light on both sides of each gas pump pointing to the base of the pump, and general lighting recessed into the canopy. Petitioner also proposes to install new heads on four existing 16-foot pole lights, to cut back on glare and light overflow, and to replace a fifth 16-foot pole light with a 12-foot pole and a new head. All pole lights and general canopy lights are to have cutoff reflectors, flat lenses and external light shields. See Ex. 42(b). On the convenience store building, Petitioner proposes 12 exterior wall lights, four entry soffit lights and 40 perimeter soffit lights. The proposed lighting plan is reproduced below.

Light Schedule from Lighting Plan, Ex. 44(c)

LIGHT SCHEDULE							
ITEM LABEL	LOCATION	QUANTITY	MANUFACTURER	MODEL NO.	FINISH/COLOR	LAMP	REMARKS
A	AREA POLE LIGHT (EXISTING)	5	LSI	CHALLENGER CHYEP11BSMYCT	BLACK	175 MH	NEW HEAD ON 4 OF 5 EXISTING 16' POLE NEW HEAD AND NEW 12' POLE ON 1 EXISTING BASE
B	CANOPY DOWN LIGHTS-FOCUSED SPOT	12	LSI	ENCORE FOCUS ECTASFP100P30FO	WHITE	100W MH	ADJUSTABLE FOCUS CUT-OFF OPTICS 40 DEGREE SPREAD
C	CANOPY DOWN LIGHTS	12	LSI	ENCORE LOW PROFILE	WHITE	115W MH	80NA FULL CUT-OFF
D	EXTERIOR WALL LIGHTS	12	LSI	CASCADE CAS10MH	BUFF ON COCOA	70W MH	MOUNTED AT 7'-0" ABOVE WALK TO BOTTOM OF FIXTURE
E	ENTRY SOFFIT LIGHTS	4	LSI	RICHMOND RICS175MHDLWHT	WHT-WHITE	175 MH	DROP LENS, APPROVED FOR DAMP LOCATIONS
F	PERIMETER SOFFIT LIGHTS	40	LSI	SQUIRE 881H00120VWHT	WHT-WHITE	75W FLUORESCENT	SOFFIT STRIP
G	MONUMENT SIGN LIGHTS	4	LSI	SQUIRE 481H00120VWHT	WHT-WHITE	38W FLUORESCENT	INSIDE MONUMENT ROAD SIGN
H							
I							
J							
K							
L							



The submitted photometric plan shows varying lighting levels along the property lines, with low levels in many places and spikes underneath the pole lights. Along the rear property line abutting the Safeway building, illumination levels range from zero to 0.1 footcandles. Along the eastern property line, abutting part of the Safeway parking lot, illumination levels on the Safeway side of the line range from zero footcandles in the rear corner to 0.1 in the front corner, with 2.6 footcandles near one pole light and 2.8 footcandles near a second pole light. Along the front of the property, illumination levels range from 0.1 footcandles at the east end to 0.4 footcandles in the center, 5.9 footcandles close

to a pole light and 0.3 footcandles at the west end. Along the west side of the property, the only side abutting residentially zoned property, illumination levels are less than one footcandle everywhere except next to the 12-foot pole light located between the vacuums and air pump. Across the property line at that location, the illumination level is 0.2 footcandles.

Zoning Ordinance Section 59-0G-1.23 specifies a series of development standards for special exceptions. Section 59-G-1.23(h) states, under the heading "Lighting in residential zones," that lighting levels along the side and rear lot line "must not exceed 0.1 foot candles." The section also states, however, that the Board may require different standards "to improve public safety." There was much discussion about this provision during the hearing, because the photometric plan in evidence at that time (Exhibit 9(g)) showed lighting levels of 1.6, 0.6 and 0.7 footcandles across the property line near what is now depicted as a 12-foot pole light.

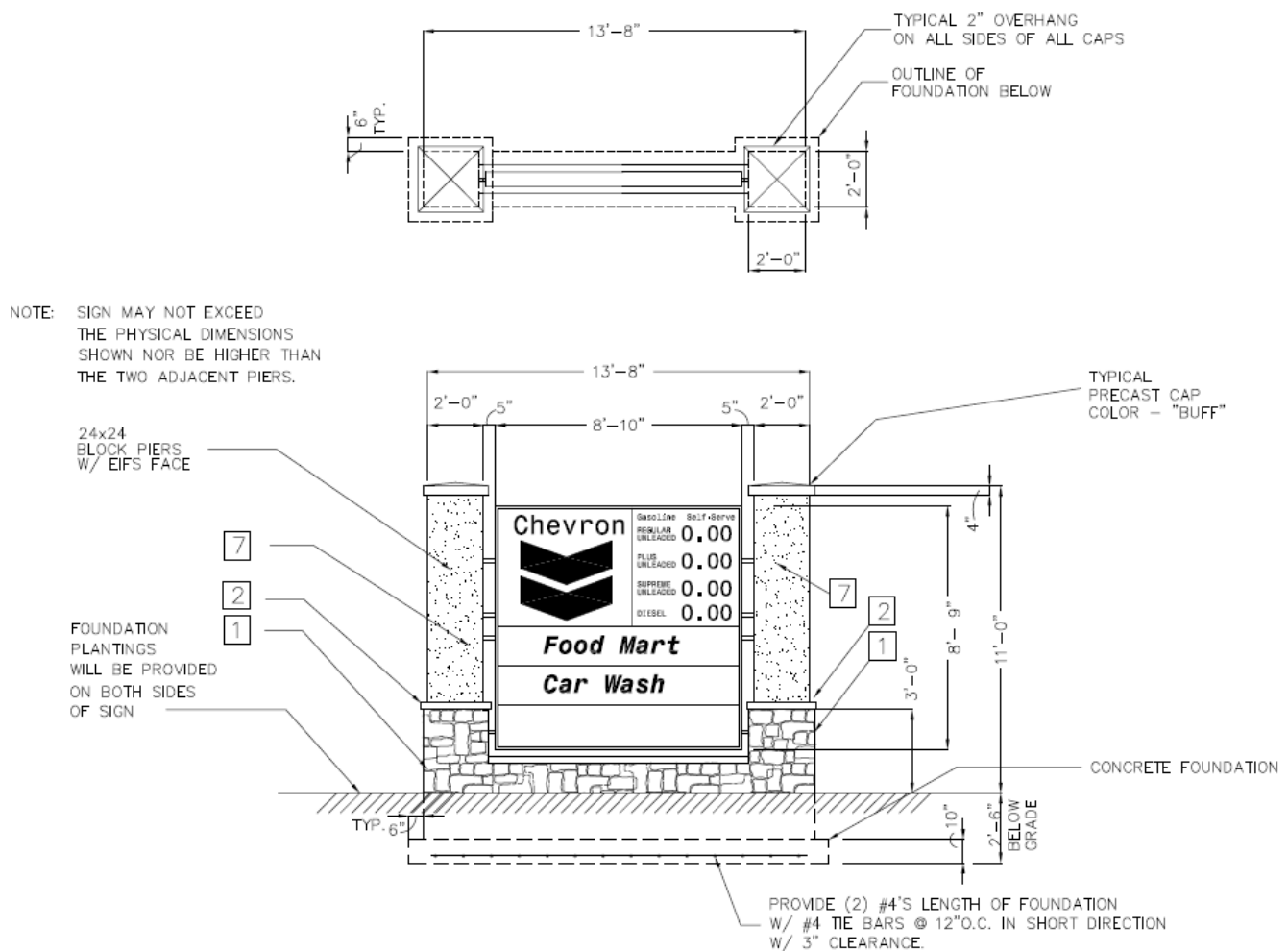
As a threshold matter, the Hearing Examiner notes that it is not entirely clear whether Section 59-G-1.23(h) is intended to apply only to a special exception property that is itself in a residential zone, or also to property like the subject site, which is in a commercial zone but abuts residentially zoned land. Assuming that the intent of the provision is to protect residential uses from special exception lighting, it should be applied to property that abuts residentially zoned land. The Hearing Examiner considers the 0.1-foot candle standard to be applicable only along the western property line of the subject site, because none of the other adjacent properties is residentially zoned.

Petitioner's architect, Carl Newburg, who prepared the lighting plan, opined that a pole light is necessary at this location for safety purposes, because it lights one of the two driveways in and out of the site and also provides light for customers using the air pump and vacuums. See Tr. at 106; Ex. 42(b). At this location on the site, next to the vacuums and air pump, people may be getting in and out of their cars quickly, and adequate lighting is needed for visibility. See Ex. 42(b). Mr. Newburg noted, to provide some context, that a full moon produces about 0.4 foot candles of light. He testified that the pole could be lowered to 12 feet, which would decrease the spread of light to the adjacent property but would increase illumination levels immediately under the pole. The final submitted

photometric plan shows this pole at a 12-foot height, with lighting levels on the western side of the property line no higher than 0.2 foot candles. The Hearing Examiner recommends that the Board of Appeals approve the submitted lighting plan, with its small deviation from the 0.1-foot candle standard, to improve public safety.

Petitioner proposes a low monument sign in the southeast corner of the site, with modest lighting. The proposed sign is depicted below:

Proposed Sign, from Ex. 9(e)



F. Development Standards

As shown in the table below, adapted from the December Staff Report, the proposed development would comply with all applicable development standards under the C-1 Zone except with regard to parking. Petitioner requests a waiver of applicable parking requirements to permit 17 parking

spaces instead of 18, as discussed in Part II.D above, and a second waiver to permit a side setback on the west side of the property of eight feet, rather than the 12 feet normally required.

Development Standard	Required	Provided
Maximum Lot Area	15 acres	26,250 sq. ft.
Minimum setbacks for main building		
From street	10 ft.	120 ft.
Side yard – west side ⁶	12 ft. one side, 25 ft. combined	26 ft.
Side yard – east side ⁷	10 ft.	24 ft.
Rear Yard	0	0
Maximum building height	30 ft.	Approx. 20 ft.
Minimum green area	10%	15.4%
Parking: minimum spaces required	18	17
Parking setback from R-200 property to west	12 ft.	8 ft.

The Board of Appeals is authorized to waive any requirement of Chapter 59-E that is “not necessary to accomplish the objectives in Section 59-E-4.2.” Section 59-E-4.5. Technical Staff opined that the proposed parking meets the parking facility objectives of Section 59-E-4.2, based on the following findings:

Sec. 59-E-4.2. Parking facilities plan objectives.

A parking facility plan shall accomplish the following objectives:

(a) The protection of the health, safety and welfare of those who use any adjoining land or public road that abuts a parking facility. Such protection shall include, but shall not be limited to, the reasonable control of noise, glare or reflection from automobiles, automobile lights, parking lot lighting and automobile fumes by use of perimeter landscaping, planting, walls, fences or other natural features or improvements.

Staff finding: Adjacent residentially zoned property is reasonably protected from automobile nuisances because the parking is screened. The adjacent land contains an approved special exception for a wholesale nursery and garden center.

(b) The safety of pedestrians and motorists within a parking facility.

⁶ Except in circumstances not relevant here, C-1 property adjoining a residential zone must have a side yard setback not less than that required in the adjoining zone. The adjoining property to the west is zoned R-200, which has a 12-foot side setback requirement.

⁷ Where adjoining property is not residential, the C-1 Zone does not require any setback. If a setback is provided, however, it must be a minimum of ten feet. Here, Petitioner has chosen to provide side setbacks on both sides.

Staff finding: Pedestrians and motorists will be able to safely maneuver onto the site, park, enter the buildings, and exit the site safely. Van accessible parking space for persons with disabilities will be provided to ensure safe and efficient loading areas.

(c) The optimum safe circulation of traffic within the parking facility and the proper location of entrances and exits to public roads so as to reduce or prevent traffic congestion.

Staff finding: The objective will be met by allowing vehicles to enter the subject site from the two existing entrances.

(d) The provision of appropriate lighting, if the parking is to be used after dark.

Staff finding: Appropriate lighting will be provided.

Petitioner's counsel states that the eight-foot setback proposed for the parallel parking spaces is necessary due to the width of the parking spaces and of the access lanes needed to accommodate two-way traffic alongside the pumps. Two-way access is necessary on both sides of the pumps to avoid conflicts between car wash or convenience store traffic and vehicles exiting the fueling area. See Ex. 40. Petitioner's counsel argues that the landscaping proposed within the setback area would provide an adequate buffer for the neighboring property. See *id.*

The merits of granting the requested waivers are discussed in Part IV.B.

G. Traffic

One of the "general conditions" that must be satisfied before a special exception may be granted requires a finding by the Board of Appeals that the proposed special exception will be in harmony with the general character of the neighborhood considering, among other things, traffic and parking conditions. In addition, in a case that will not require a subsequent subdivision approval, such as the case at hand, the Board of Appeals must determine the adequacy of public facilities, including compliance with the requirements of Local Area Transportation Review ("LATR"). Code § 59-G-1.2(a)(9). Accordingly, a review of traffic issues is necessary.

Under the County's 2003-05 Growth Policy Element, which remains in effect, subdivision applications are subject to only one transportation test, Local Area Transportation Review ("LATR").⁸ LATR involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hours of the morning and evening peak periods (6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.). Petitioner performed a traffic study as required in this case, taking into account existing roads, programmed roads and available or programmed mass transportation, as well as existing traffic, traffic anticipated from nearby development that is approved but unbuilt ("background" traffic), and trips expected to be generated by the proposed development. See Ex. 12. Technical Staff directed Petitioner to study the effects of the proposed development on critical lane volumes ("CLVs") at three nearby intersections along MD 28: MD 124 (Quince Orchard Road), the Safeway entrance, and Riffle Ford Road. Petitioner's traffic study also examined traffic at the existing site entrances.

Petitioner's traffic study concluded that with the proposed modification, all but one of the intersections studied would operate below the CLV threshold for the planning area of 1,450. The exception is the intersection of MD 28 and Riffle Ford Road, which already exceeds the CLV standard during the evening peak hour. The CLV count at that intersection would increase by five with the proposed modification, worsening congestion at an intersection that is already failing the CLV standard.

When a development is expected to cause an intersection fail the CLV standard, or to worsen congestion at an intersection that is already failing, the project proponent is required to mitigate the adverse impact, usually by making improvements to the roadway network that allow traffic to flow more freely. If a project is expected to generate between 30 and 49 new weekday peak-hour vehicle trips, however, the Planning Board may permit the developer to make an additional payment equal to 50 percent of the applicable transportation impact tax, instead of making physical improvements to bring CLV levels down. See LATR Guidelines at 7. In the present case, after applying the standard deduction of 60 percent for the number of gas-station trips that are considered "pass-by" trips (drivers

⁸ See 2003-05 AGP Policy Element at 6-7; *Local Area Transportation Review Guidelines Approved and Adopted July 2004* ("LATR Guidelines") at 1. The Hearing Examiner hereby takes official notice of the LATR Guidelines.

who are using that road anyway and merely stop off at the gas station), the proposed modification is expected to increase the number of trips to the subject station by 47 in the weekday morning peak hour and 48 in the weekday evening peak hour. See Ex. 12 at 13. These are considered the “new” trips. Accordingly, Petitioner requested approval from the Planning Board to make an additional payment instead of physical improvements. In so doing, Petitioner stressed that the five additional CLVs the proposed development would generate at Riffle Ford Road and Route 28 represent an increase of between one-quarter and one-half of one percent in the number of CLVs.

The State Highway Administration recommended that Petitioner be required to add a separate right-turn lane on Riffle Ford Road to mitigate its impact on congestion. See Ex. 19(a). Technical Staff carried this recommendation forward in its review of the petition. See Transportation Staff Memorandum dated February 28, 2007, attached to March Staff Report, at 2. Mr. Lenhart testified that in its deliberations on this case, the Planning Board noted that this is an existing gas station that Petitioner seeks to update, that the CLV impact would be de minimus and that building the additional turn lane would involve a substantial cost. Mr. Lenhart estimated that adding a new turn lane would mitigate 15 to 20 times the number of trips that the proposed use would generate, and argued that it would be unfair to require this Petitioner to make an expensive intersection improvement when SHA recently completed a construction project on this roadway and failed to address the evening congestion. Mr. Lenhart also referred to an email from Transportation Planning Staff at the MNCPPC stating that Staff would not have a problem with a payment in lieu, if the Planning Board so chose. See Ex. 37. The Planning Board found Petitioner’s offer to make an additional payment instead of constructing a turn lane to be acceptable, concluding that a reasonable nexus did not exist between the demands generated by the proposed modification and a requirement to construct an additional turn lane. See Exs. 23, 24. Accordingly, the Planning Board recommended approval of the modification with a condition requiring the additional impact tax payment. See *id.*

H. Environment

The subject site has no existing natural features. Technical Staff reports that Petitioner has obtained an exemption from forest conservation requirements. See December Staff Report at 14. Technical Staff also reports, incorrectly, that the site has an approved stormwater management system in place. See *id.* Petitioner's site planner, Lee Sutherland, testified more credibly that the site was originally developed prior to the inception of stormwater management requirements, and currently has no on-site stormwater management. Mr. Sutherland stated that Petitioner is currently exploring pervious paving materials and other means of addressing stormwater management. He testified that he does not believe there is any reason stormwater quality and quantity control cannot be adequately maintained for this project.

I. Community Involvement.

The record contains no indications of any community interest in this application. Mr. Abrams mailed letters directly to several community associations in the area, alerting them to this application, and received no response. See Ex. 18, Tr. at 132.

III. SUMMARY OF HEARING

A. Applicant's Case in Chief

1. Lee Sutherland, land planner. Tr. at 6-86.

Mr. Sutherland was designated an expert in site design and land planning, over the objection of community member Wayne Goldstein. Mr. Goldstein submitted copies of excerpts from Maryland statutes regarding licensed professionals, specifically engineers, landscape architects and surveyors. See Ex. 28. The language of these excerpts defines each of the three professions by describing the activities or tasks that they carry out. The statutory language further states that these professionals may not submit certain types of plans, nor may a public agency accept certain types of plans, unless they bear the seal or certification of a licensed professional. Mr. Goldstein argued that

under these provisions of state law, no person can submit a document such as a site plan to the Hearing Examiner or the Board of Appeals unless that document is sealed or certified by one of the three categories of licensed professionals cited above: engineer, landscape architect or surveyor. He further contends that no one should be recognized as an expert witness “who is not licensed in a particular field where licensure is required by the State of Maryland.” Tr. at 24.

Mr. Sutherland has not suggested in this proceeding that he holds any professional license. He holds himself out as an expert in site design and land planning based on more than 35 years’ experience in the field in Montgomery County and elsewhere in Maryland. He has testified as an expert in land planning before the Board of Appeals and the Hearing Examiner on numerous occasions, including before this Hearing Examiner in a special exception modification case within the past year. The Board of Appeals and the Office of Zoning and Administrative Hearings may wish to consider the broader applicability of the statutory sections cited by Mr. Goldstein and whether they require any changes to the submission requirements in special exception cases. On this record, however, the Hearing Examiner is not persuaded that state law prohibits Mr. Sutherland from submitting plans that he has prepared, or from serving as an expert witness. The Hearing Examiner will take the liberty of noting, however, that the site plan and landscape plan that Mr. Sutherland prepared in this case are very difficult to read, partly because of their small scale. He may wish to consider computerizing his preparation of plans or collaborating more extensively with others who have such capabilities. Fortunately for the Petitioner in this case, his architect submitted clear, legible plans that provide an adequate basis for the Board’s consideration of this matter and for future enforcement actions.

Mr. Sutherland briefly described the subject site and its surroundings. He described the surrounding area as mixed in character, with a commercial triangle surrounded by residential developments. Mr. Sutherland noted that a special exception was granted in 1970 to permit a gas station with two service bays on the subject site, and the station has operated at this location ever since. He noted that the area has grown considerably during that time, with more residential and commercial development, plus the high school across the street. He described Petitioner’s plans,

which include removing the existing fueling stations and canopy and installing new fueling stations, with three islands perpendicular to Route 28 and an overhead canopy. The convenience store/automobile service building that currently sits further back on the site would be replaced with a new, larger convenience store building with a car wash behind it, butting up against the adjacent Safeway store. Mr. Sutherland noted that the convenience store building would be wider than the car wash structure, hiding the car wash from view from the street.

Mr. Sutherland stated that the vehicular circulation pattern to the fueling stations would be basically the same as currently, with access only from westbound Darnestown Road and a right-in/right-out restriction at both driveways. Access to the car wash would be provided along the east side of the convenience store, exiting along the west side of the store. Mr. Sutherland observed that circulation to the car wash would “kind of mingle” with circulation to the convenience store and the pumps, but the space would be wide enough for two cars to pass easily in opposite directions on either side of the canopy, even with cars parked in the parallel parking spaces on the sides of the site. He noted that the space from the edge of the canopy to the edge of the side parking spaces measures 20.5 feet, and 20 feet is the standard width for a two-lane road in Montgomery County. Mr. Sutherland estimated that there is room for nine to ten vehicles to stack in line for the car wash, leaving room for access to the gas pumps. In his opinion, based on the experience of the Petitioner’s managing partner, Carlos Horcasitas, who has operated many car washes in this County and is familiar with the speed of the car wash that would be used at this site, this should be enough to avoid any vehicles queuing on Darnestown Road. Tr. at 50.

Mr. Sutherland noted that the new construction would require filling in the area right in front of the Safeway store, which slopes down steeply, and constructing retaining walls on both side property lines. He stated that this would allow the drainage pattern to remain the same, with stormwater going into a storm drain system in Route 28. Petitioner proposes additional landscaping, including four deciduous trees in landscape islands, and evergreens along the western side of the site and the top and bottom of the retaining walls. In addition, a screening fence would be installed on top

of the retaining wall on the west side of the site, to shield the nearest residences to the west from possibly having a view of the convenience store and car wash. Mr. Sutherland noted that the back lot line of nearest homes to the west, in the Willow Ridge subdivision, are approximately 500 feet from the subject site. The Orchard Hills subdivision to the north is closer geographically, about 400 feet away, but has essentially no view of the subject site because of the intervening Safeway shopping center buildings.

Mr. Sutherland described the results of a survey he conducted of existing filling stations in the area. He found three filling stations within one mile of the site, two of which had car washes. By the time of the hearing, one of the three had closed. The one without a car wash is located across the street and is also owned by Mr. Horcasitas. Mr. Sutherland located an additional gas station between one and two miles from the subject site, with a car wash, and two more beyond the two-mile line.

When asked whether the proposed use would be consistent with the applicable master plan, Mr. Sutherland provided the un-illuminating response that he doesn't remember seeing anything "other than the fact it's shown in the C-1 zone and is developed," and that he believes the proposed modification "provides a service for the area." Tr. at 58.

Mr. Sutherland opined that the proposed modification would be consistent with the general and specific conditions for the use. He noted that it is an expansion of an existing use in a commercial zone. Mr. Sutherland acknowledged that the impact of the proposed modification depends to some degree on the ultimate use of the undeveloped parcel to the west, which has a recently-modified special exception that has not been implemented. The adjacent property is classified under the R-200 Zone and could be developed for residential use. Even if that takes place, Mr. Sutherland opined, the screening measures and setbacks proposed along the western property line would be adequate to buffer the nearby residences. See Tr. at 56. Mr. Sutherland opined that the renovated gas station would blend into the commercial area as part of the Safeway shopping center, even though it is not directly connected to the shopping center. At this point in the hearing, Petitioner's modification request included changing the hours of operation for the gas station to 24 hours a day, compared to the

current hours of 7:00 a.m. to 11:00 p.m. When asked by the Hearing Examiner whether the longer hours would have an impact on the community Mr. Sutherland stated “I don’t remember a change in hours, but, I could be wrong. I defer to the owner on that.” Tr at 59. In the Hearing Examiner’s view, Mr. Sutherland’s lack of familiarity with one of the basic changes that was proposed in the nature of this operation dramatically reduces the weight that can be given to his opinion regarding its impacts.

Following the Hearing Examiner’s comment that neither Mr. Sutherland nor Technical Staff had analyzed the potential impacts on the neighborhood of this gas station becoming a 24-hour operation, Petitioner stated that he would like to change the proposed hours to 6:30 a.m. to 12:00 midnight, instead of 24 hours a day.⁹ See Tr. at 61. The hours would be the same for both the gas station and the convenience store.

Mr. Sutherland confirmed that Petitioner does not propose to have any outdoor product displays or storage, vehicles overhanging the public right-of-way, repair work, or vehicle rental on the premises. The closest pump to the street would be more than 30 feet away. He opined that the proposed convenience store is a permissible accessory use in the zone.

Mr. Sutherland stated that the property currently has no on-site stormwater management because it was developed before such requirements existed. He stated that Petitioner is exploring different approaches to managing stormwater, such as using new pervious pavement, and that there is no reason to believe quantity and quality controls cannot be adequately implemented.

Mr. Sutherland stated that he is not aware of any non-inherent adverse effects related to the proposed modification. He noted that if Petitioner were required to construct a right-turn lane at Darnestown and Riffle Ford Roads, depending on the length of the acceleration or deceleration lane, a newly-installed sidewalk might have to be relocated, and a specimen tree might be endangered.

⁹ Technical Staff opined in a post-hearing email that the modification as originally proposed, with 24-hour operations, would not have an adverse impact on the neighborhood “because the area contains a large number of commercial uses, including the two landscaping businesses on either side of the subject site, the Safeway grocery store, and a bank.” Ex. 38. Staff noted that that one of the Johnson nursery sites is between the subject site and the nearest residential neighborhood, the site would be screened from the nearest residences, and the site is located on an arterial highway and across the street from a school. See *id.* By the time this email was received, however, Mr. Horcasitas had withdrawn the request to stay open around the clock.

Mr. Sutherland explained the lot line setback requirement for the C-1 Zone, which is somewhat confusing. He stated that no setback is required, but if a setback provided, it has to be a minimum of ten feet. See Tr. at 84-854. Mr. Sutherland suggested that the 10-foot minimum may be for fire access.

2. Carl Newberg, architect. Tr. at 88-116.

Mr. Newberg was designated an expert in architecture. He testified that he prepared all of the architectural drawings, floor plans and lighting plans except the photometric plan, which was prepared by the lighting manufacturer.

Mr. Newburg described the improvements proposed for the site: two entrances along the street, a 30 x 80-foot canopy,¹⁰ six islands with a total of 12 fueling stations, a 30 x 100-foot convenience store at the back or north side of the property and a 25 x 65-foot car wash behind the convenience store. He stated that the total building square footage for the car wash would be 1,514 square feet. The upper left-hand corner of the site would have two trash containers within a walled, gated enclosure. Mr. Newburg submitted a plan showing nine cars stacked up for the car wash, and he testified that a tenth vehicle could also fit, closer to the entrance. See Tr. at 92. He noted that the car wash would have two 1,000-gallon, gravity-fed recycling containers fed by a trench drain running the full length of the car wash, allowing the water to be recycled back through the equipment and reused.

Mr. Newburg described the proposed lighting, starting with an internally-lit, low monument sign and two types of lights under the canopy: a focused, directional light on both sides of each gas pump pointing to the base of the pump, and general lighting recessed into the canopy. At that point in the proceedings, Petitioner's proposal included installing new heads on five existing pole lights to cut back on glare and light overflow. The Hearing Examiner questioned whether one particular pole light, on the west side of the site between the canopy and the property line, was consistent with the Zoning Ordinance standard that calls for site lighting no greater than 0.1 footcandles on the side property line of a residential property. The photometric plan showed footcandles well in excess of that,

¹⁰ The canopy is shown on the site plan with a 40-foot width, not 30 feet. See Ex. 49(a).

in the range of two to three footcandles, near that particular light. Mr. Abrams argued that the Board of Appeals should approve the lighting for safety reasons, as permitted under Section 59-G-1.2.1(h). Mr. Newburg observed that a full moon generates 0.4 footcandles of light, suggesting that 0.1 is a very low standard. He also noted that the proposed modification would improve the current condition by adding shielding and reducing the wattage. Mr. Newburg acknowledged that the west retaining wall would not shield any of the light from this pole, because it would stop short of that point on the site.

There was considerable discussion at the hearing as to whether it would be safe to remove that particular light pole. Mr. Newburg opined that the light from the canopy would not be sufficient without the pole light because this would be a high-traffic area, including potentially people using the vacuums to clean out their vehicles. He stated that the height of the pole could be reduced while still providing adequate lighting, which would reduce glare and light overflow but would not reduce the footcandles on the ground. Mr. Newburg recommended reducing the pole to 12 feet in height, with the same proposed lighting fixture. He explained that the diameter of the cone of light would be smaller. It would be brighter in the middle and darker farther out, so the footcandles might be higher right under the light, but would be lower on the other side of the property line than with the higher pole, so any future neighbors on that side would be better off. Mr. Newburg also offered to add an additional shield on the west side of the fixture and/or put in a directional light. Finally, Mr. Newburg opined that the lighting as proposed would not cause any adverse glare on adjacent properties. [In post-hearing submissions, the light pole in question was reduced to 12 feet.]

Mr. Newburg stated that the existing sign would be replaced with a low monument sign. He testified that he has designed multiple gas stations, and opined that the nature of the use proposed for the subject site would be compatible with other uses in the adjacent commercial center. Mr. Newburg stated that the landscaping proposed in connection with the modification would provide additional screening and further enhance the commercial area.

3. Michael Lenhart, traffic engineer. Tr. at 116-135.

Mr. Lenhart was designated an expert in traffic engineering and transportation planning. He stated that the subject site has direct access to the westbound lanes of MD Route 28. He noted that three or four years ago, the SHA did a reconstruction of Rte. 28 that converted it to a divided roadway, leaving the subject site with only right-in/right-out access.

Mr. Lenhart described the traffic study he performed for this proposed modification, following the LATR Guidelines. His study included performing traffic counts at four intersections: (MD 28 at Riffle Ford Road, at the site access points, at the entrance to the Safeway (the same traffic signal that controls the entrance to Quince Orchard High School across the street), and at Quince Orchard Road, MD 124. He added background developments and then assigned trip generation and trip distribution rates to the traffic anticipated from the subject site with the proposed modification. The study concluded that with the proposed modification, all of the intersections studied would operate below the 1,450-CLV threshold for the planning area, with one exception. The intersection of MD 28 and Riffle Ford Road already exceeds the CLV standard during the evening peak hour, and the CLV count would increase by five with the proposed modification. Mr. Lenhart stressed that this represents an increase of between one-quarter and one-half of one percent in the number of CLVs.

Mr. Lenhart noted that the LATR Guidelines give the Planning Board the discretion to allow a payment in lieu of physical transportation improvements if a proposed development would lead to 30 to 49 new trips. He stated that the Planning Board recommended accepting such a payment in this case, despite a recommendation from the SHA to require construction of a new right-turn lane, because the impact of the modification would be de minimus.

Mr. Lenhart acknowledged that eastbound traffic would need to make a U-turn after leaving the subject gas station. He stated that there are left-turn lanes west of the site to make U-turns, including at the signalized intersection opposite the Safeway entrance. Mr. Lenhart is not aware of any accidents stemming from this traffic pattern, and stated that gas stations can be located mid-block as long as there are safe turning movements.

With regard to space for vehicles to line up for the car wash, Mr. Lenhart noted that the County does not have car wash trip generation rates. Based on rates established by the nationally known Institute of Transportation Engineers, the proposed car wash would generate 11 trips in and 11 trips out during the peak hour for weekday evening traffic in that part of the street. Estimating conservatively that 40 percent of that hour's worth of traffic might be on the site at one time, Mr. Lenhart concluded that there could be four to five vehicles waiting in line. Mr. Lenhart did not estimate in his report the number of trips the car wash might generate during periods other than the weekday evening peak hour, such as Saturdays, when many people might be heading to the adjacent Safeway. He opined at the hearing, however, that retail uses generally have a peak period midday on Saturday, between about 10:00 a.m. and 2:00 p.m., with 20 to 30 percent higher traffic than in the weekday evening peak hour. Increasing the 11 vehicles to 15 (an increase of 36 percent), and estimating that 40 percent might be on site at once, Mr. Lenhart concluded that there could be six to seven vehicles waiting for the car wash at one time. See Tr. at 128-29. He noted that six vehicles could line up without reaching the gas station part of the site, and then alongside the pumps there would be room for another three or four vehicles without backing onto MD 28. Mr. Lenhart stated that drivers could still get to the pumps with a line of cars waiting for the car wash. He added that people often will use a car wash only if it is convenient. If the line is long, they will often wait and come back another time.

Mr. Lenhart testified that the proposed development would not cause any traffic safety or circulation problems, nor is he aware of any pedestrian safety or circulation problems in the area. He noted that there are several traffic signals and pedestrian crosswalks in the area, including at the Safeway/Quince Orchard High School entrances.

4. Carlos Horcasitas, Petitioner's representative. Tr. at 135-142.

Mr. Horcasitas has been the managing member and CEO of Petitioner, Mid-Atlantic Petroleum Properties, since its inception in November 1995. He has been in the filling station business since he started pumping gas during college in 1976. As he described it, he was in the right place at the right time in 1979 and was able to purchase two gas stations in Montgomery County from BP Oil.

Mr. Horcasitas' company acquired the lease on the subject station in 2002 and changed the brand from Amoco to Chevron. He indicated that the station had been in operation since 1970 or 1971, and was reopened as a Chevron station in the summer of 2002. Mr. Horcasitas confirmed that the owner of the subject property is Johnson's Enterprises, which also owns the adjacent property that has a special exception for a garden center.

When asked why he proposes to undertake an expensive renovation, Mr. Horcasitas testified that the station is antiquated, and today's customers demand more services from gas stations. He noted that many of the newer stations include an automated car wash. Mr. Horcasitas explained that the car wash he proposes for this site is a conveyor operated machine. Two cars can be loaded onto it, and the machine pushes them through. It can move fast enough to clean 60 cars in an hour, so the operators can turn up the speed if there is a crowd, but they can also slow it down to do a better job when the line isn't so long.

Mr. Horcasitas confirmed that all of the representations about the business in the submitted Statement of Operation are accurate, except for the hours of operation that he changed during the hearing. See Tr. at 138. He stated that no repairs would be done on site, nor would any products be displayed outside of the convenience store building.

Mr. Horcasitas described convenience stores as a common feature of gas stations in the area, noting that he operates other gas stations with convenience stores. He stated that convenience stores today often serve carry-out food, offering more services so customers don't have to take multiple trips. Mr. Horcasitas said that at this site, the convenience store would serve freshly prepared sandwiches and pizzas.

Mr. Horcasitas confirmed that with the proposed modification, the subject site would have three fueling islands with two dispensers each, serving a total of 12 vehicles. He stated that the dispensers would take credit cards and would exceed applicable environmental emission standards. Mr. Horcasitas explained that when he took over the site, he installed new underground equipment and new pumps, so the operation already exceeds environmental standards.

B. People's Counsel

The People's Counsel, Martin Klauber, provided a description of the Planning Board's deliberations concerning the traffic mitigation issue. He stated that Technical Staff had reaffirmed the SHA's recommendation that Petitioner be required to construct a right-turn lane, without considering the minor nature of the expected impacts. Mr. Klauber stated that Petitioner's counsel, Stanley Abrams, argued to the Planning Board that the impact of the proposed modification on CLVs at the intersection in question during the peak hours would be de minimus. See Tr. at 69-70. Following this, the Planning Board accepted Petitioner's offer to make an additional payment instead of constructing a new turn lane. See Tr. at 69-70.

IV. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. The special exception is also evaluated in a site-specific context because there may be locations where it is not appropriate. Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed modification, with the conditions recommended at the end of this report, would satisfy all of the specific and general requirements for the use. While there were weaknesses in Mr. Sutherland's testimony, the key points were well-corroborated by testimony from Mr. Lenhart and Mr. Newburg.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are "the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations." Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are "physical and operational characteristics not

necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an automobile fueling station. Characteristics of the proposed modification that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed modification that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

The Hearing Examiner considers the following to be inherent characteristics of an automobile fueling station: fuel pumps; a structure to provide storage space and shelter for employees; traffic generated by customers, employees and fuel deliveries; queuing of vehicles; noise; signage advertising type of gas and price; outdoor lighting; long hours of operation; and environmental impacts including fumes from idling vehicles and the spillage of oils and other automobile fluids.

Technical Staff identified “the building, vehicle activity, fumes and noise associated with the pumping of gas, and lighting associated with the traffic and movement of people associated with the proposed gas island, building and car wash” as inherent adverse effects. December Staff Report at 14. The Hearing Examiner disagrees with Technical Staff’s assessment, finding that it better describes a typical modern gas station than the elements that are necessarily associated with the use as defined in the Zoning Ordinance. “Automobile filling station” is defined as follows (Section 59-A-2.1):

Any area of land, including buildings and other structures thereon, that is used to dispense motor vehicle fuels, oils and accessories at retail, where repair service is incidental and no storage or parking space is offered for

rent. A car wash with up to 2 bays may be allowed as an accessory use to an automobile filling station.

This definition does not mention a convenience store, which has become a very common feature of gas stations, but is not necessarily associated with the use – gas stations still exist without convenience stores, and particularly without a large convenience store selling freshly prepared food, as proposed for this location. The site currently has a small convenience store, but the modification would significantly increase its size and the associated level of activity. The definition anticipates a car wash as an accessory use, suggesting that it is part of some, but not all, gas stations. Accordingly, the Hearing Examiner considers the convenience store and the car wash to be non-inherent characteristics of the proposed modification. The evidence indicates, however, that neither of these features of the proposal would lead to adverse impacts sufficient to warrant denial of the application.

The convenience store would be open long hours, but only slightly longer than the current hours (opening 30 minutes earlier in the morning and closing one hour later at night). It would also likely attract additional traffic to the site due to its larger size and expanded product offerings. A car wash has inherent impacts in terms of noise, fumes, activity levels and visual intrusion. The impacts of both the convenience store and the car wash would be mitigated, however, by retaining walls, fencing and landscaping along the side property lines, which would screen them from view and reduce other impacts, particularly for the residentially-zoned property to the west. Moreover, the closest rear lot line for the homes to the west is approximately 500 feet from the subject site, a substantial distance. To the north, the impacts of the convenience store and the car wash would be absorbed by the wall of the Safeway store that sits, literally, on the property line. To the east and northeast, the adjacent land use is a large parking area associated with the Safeway shopping center, which would make the uses on the subject site virtually invisible from homes to the east and north. To the south, the subject site abuts Darnestown Road, a four-lane, divided, major roadway whose impacts are very likely more noticeable than the impacts of the proposed convenience store and car wash. The car wash would not be visible from the street, as it would sit behind the larger convenience store building. In addition, the undisputed evidence indicates that there is sufficient room on site for nine or

ten cars to line up for the car wash without impacting traffic on Darnestown Road. Petitioner's traffic expert provided persuasive evidence that no more than seven vehicles would likely be in line for the car wash at one time. Moreover, a car wash is a convenience service, and many drivers will forego that service if the line is longer than the number of vehicles that would fit on this site.

The Hearing Examiner considers the remaining aspects of the proposed modification to be inherent characteristics of the use. The increase from 8 to 12 fuel pumps would not result in a gas station of unusual size or character. The station already has a canopy over the pumps, and while the modification would increase the size of the canopy, it would also move it farther back from the street, likely reducing its visual prominence. The hours of operation would be only slightly longer than currently, and the number of employees would increase only by a small amount.¹¹ Lighting would be improved by replacing older fixtures with new fixtures incorporating cutoff reflectors, flat lenses and external light shields, which would reduce off-site impacts. One of the existing poles near the western property line would be lowered from 16 feet to 12 feet, further reducing off-site impacts. Landscaping would be significantly increased, enhancing the appearance of the site.

The most significant impact of the proposed modification would likely be the increase in traffic to the site. Including trips coming directly to the subject site and pass-by traffic (drivers stopping on their way to another destination), the site currently generates 88 trips during the weekday morning peak hour and 133 during the weekday evening peak hour. Ex. 12 at 13. With the proposed modification, the station is expected to generate 206 new and pass-by trips during the weekday morning peak hour and 231 during the weekday evening peak hour. Id. This would double the morning peak hour traffic and increase afternoon peak hour traffic by roughly 75 percent. As discussed in Part II.G, the traffic study found that these increases would not have an adverse effect on CLVs at nearby intersections, except for the evening peak hour at Riffle Ford Road and Route 28. At this location, there would be a very small increase in CLVs, which the Planning Board termed "de minimus." The Hearing

¹¹ The station currently has four employees. With the modification, the number of employees would increase to seven, but the number on a single shift would be no more than three. Assuming that the four current employees work in shifts of two, the number of employees on site at one time would increase only by one. The number of employee trips to the site would increase by no more than six trips per day (two for each additional employee).

Examiner agrees with the Planning Board that increasing CLVs at this intersection by one third of one percent should be considered de minimus, and does not warrant either the obligation to construct a new traffic lane or denial of the petition for modification. Apart from the intersection of Riffle Ford Road and Route 28, which would suffer a virtually imperceptible increase in congestion, the evidence indicates that the local roadway network can handle the increased traffic.

For all of these reasons, the Hearing Examiner concludes, based on the preponderance of the evidence, that with the conditions recommended at the close of this report, the inherent and non-inherent adverse effects of the proposed modification are not sufficient to warrant denial.

B. Specific Standards

The specific standards for an automobile filling station are found in Code § 59-G-2.06. The Technical Staff reports and Petitioner's written evidence and testimony provide sufficient evidence that with the recommended conditions, the proposed modification would be consistent with these specific standards, as outlined below.

Sec. 59-G-2.06. Automobile filling stations.

- (a) An automobile filling station may be permitted, upon a finding, in addition to findings required in division 59-G-1, that:
 - (1) The use will not constitute a nuisance because of noise, fumes, odors or physical activity in the location proposed.

Conclusion: Technical Staff notes that the subject gas station has existed for many years without creating a nuisance. The proposed modification would increase the impacts of the station by increasing the number of fuel pumps, significantly enlarging the convenience store and adding a car wash, all of which would lead to higher levels of vehicular traffic to the site and on-site noise and activity. However, as discussed in Part IV.A., visual and other impacts would be mitigated by retaining walls, fencing and landscaping. No evidence was presented concerning the level of activity generated by the service bays currently on the site, but Petitioner maintains that removing the service bays would decrease noise and physical activity by eliminating auto repairs. See Ex. 3 at 4. The Hearing Examiner finds that the evidence supports a conclusion that with the proposed modification, the noise,

fumes, odors and physical activity inherent in a gas station would not rise to the level of a nuisance at this site.

The station abuts a busy, multi-lane roadway to the south, large parking lots to the east and northeast, and the wall of a large grocery store to the north. Any impacts of the station on homes beyond the Safeway shopping center to north/northeast would be extremely limited due to the intervening commercial uses and parking lots. The subject site abuts residentially zoned property to the west that is the subject of an approved special exception for a retail garden center, which would be unlikely to suffer any adverse effects from activity levels on the subject site. If the abutting property to the west is developed for residential use at some future time, the impacts of activity on the subject site would be mitigated by significant buffering along the property line: a retaining wall, fencing and landscaping toward the rear of the site, blocking the view of the car wash and convenience store, and, with the proposed conditions of approval, fencing or a solid wall, with plantings on the outside, along the front of the site.

- (2) The use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads or intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic pattern from such buildings, or by reason of its location near a vehicular or pedestrian entrance or crossing to a public or private school, park, playground or hospital, or other public use or place of public assembly.

Conclusion: Technical Staff notes that the subject gas station has existed for many years without creating hazardous traffic conditions, and concludes that additional square footage, a car wash and additional hours of operation would not adversely affect the neighborhood. The Hearing Examiner finds that the undisputed evidence of record demonstrates that the site can safely handle the levels of traffic anticipated, and that adverse impacts on the area road network would be minimal. The site's two entrances would be unchanged, and would continue to be restricted to right-in/right-out movements. The traffic light at the Route 28/Rte 124 intersection would continue to provide sufficient gap time for cars to enter and exit the site. U-turns can safely be made close by for customers needing

access to eastbound Darnestown Road. There was no evidence to suggest that the increase in traffic, although substantial, would create dangerous conditions for patrons of the Safeway shopping center or for students attending Quince Orchard High School across the street, all of whom who have traffic lights and crosswalks available to them at the Safeway entrance/high school entrance and at nearby intersections. Moreover, the site provides adequate stacking space for the car wash, separate from the traffic pattern to the fuel pumps and the convenience store, to avoid back-ups on Darnestown Road.

- (3) The use at the proposed location will not adversely affect nor retard the logical development of the general neighborhood or of the industrial or commercial zone in which the station is proposed, considering service required, population, character, density and number of similar uses.

Conclusion: The evidence supports a conclusion that the proposed modification would not adversely affect or retard the logical development of the general neighborhood. The replacement of service bays with a car wash and an expanded convenience store and ATM are consistent with modern retailing practices in the industry, as testified by Mr. Horcasitas, and would be in character with the mixed commercial/residential character of the general neighborhood.

- (b) In addition, the following requirements must be complied with:

- (1) When such use abuts a residential zone or institutional premises not recommended for reclassification to commercial or industrial zone on an adopted master plan and is not effectively screened by a natural terrain feature, the use shall be screened by a solid wall or a substantial, sightly, solid fence, not less than 5 feet in height, together with a 3-foot planting strip on the outside of such wall or fence, planted in shrubs and evergreens. Location, maintenance, vehicle sight distance provisions and advertising pertaining to screening shall be as provided for in article 59-E. Screening shall not be required on street frontage.

Conclusion: The subject site abuts residentially zoned land to the west that is not recommended for reclassification on the applicable master plan. No evidence was presented concerning any natural terrain features that might provide screening. Adequate screening is proposed for the rear half of the property, with a retaining wall topped by a screen wall and landscaping. Technical Staff states that a solid, six-foot-high wall and a three-foot-wide, six-foot tall planting strip on the outside of the wall would screen the use. The Hearing Examiner does not see these features along

the front half of the western property line, however, on either the submitted Landscape Plan, Exhibit 49(b), or the submitted Site Plan, Exhibit 49(a). Moreover, nothing in Petitioner's testimony or written submissions suggests that a wall or fence has been proposed along the front portion of the western property line. The submitted plans show only a row of evergreens along the front half of the western property line, without the fencing that is specifically required by paragraph 59-G-2.06(b)(1). Accordingly, the recommended conditions require, before the special exception may take effect, that Petitioner submit a revised Landscape Plan and Site Plan clearly showing a "solid wall or a substantial, sightly, solid fence, not less than 5 feet in height, together with a 3-foot planting strip on the outside of such wall or fence, planted in shrubs and evergreens," along the portion of the western property line not screened by the proposed retaining wall.

The subject gas station clearly does not currently have the landscaping required by this section. Due to the increased square footage proposed, the Board of Appeals is authorized under Section 59-G-1.3(c) to re-examine the entire underlying special exception and require compliance with current requirements.

- (2) Product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or to station driveways are prohibited.

Conclusion: No product displays, parked vehicles or other obstructions are proposed that would adversely affect visibility at intersections or to station driveways.

- (3) Lighting is not to reflect or cause glare into any residential zone.

Conclusion: The evidence supports a finding that the lighting proposed would not reflect or cause glare into the neighboring residential zone to the west due to the use of cutoff reflectors, flat lenses and external light shields. The proposed modification would reduce the off-site impacts of site lighting compared to current conditions, per the testimony of Petitioner's architect. The final photometric plan shows very low levels of illumination on the far side of the western property line.

- (4) When such use occupies a corner lot, the ingress or egress driveways shall be located at least 20 feet from the intersection of the front and side street lines of the lot as defined in section 59-A-2.1, and such driveways shall not exceed 30 feet in width;

provided, that in areas where no master plan of highways has been adopted, the street line shall be considered to be at least 40 feet from the center line of any abutting street or highway.

Conclusion: The site does not occupy a corner lot.

- (5) Gasoline pumps or other service appliances shall be located on the lot at least 10 feet behind the building line; and all service storage or similar activities in connection with such use shall be conducted entirely within the building. There shall be at least 20 feet between driveways on each street, and all driveways shall be perpendicular to the curb or street line.

Conclusion: The required building setback is ten feet from the property line and the location proposed for the pumps is approximately 25 to 30 feet from the lot line. All storage shall take place entirely within the building. The distance between the two driveways is approximately 60 feet.

- (6) Light automobile repair work may be done at an automobile filling station; provided, that no major repairs, spray paint operation or body or fender repair is permitted.

Conclusion: No repair work is proposed.

- (7) Vehicles shall not be parked so as to overhang the public right-of-way.

Conclusion: The Site Plan provides for adequate parking and stacking space to avoid any vehicles overhanging the public right-of-way, and Petitioner is aware of this requirement.

- (8) In a C-1 zone, an automobile, light truck and light trailer rental, as defined in section 59-G-2.07, and in a C-2 zone, an automobile, truck and trailer rental lot, as defined in section 59-G-2.09, may be permitted as a part of the special exception, subject to the provisions set forth for such uses in this section. In addition, a car wash with up to 2 bays may be allowed as an accessory use as part of the special exception.

Conclusion: No rental activity has ever been conducted as part of this special exception, nor is any proposed. A single-bay automatic car wash is proposed, as discussed extensively elsewhere in this report.

- (9) In a Rural Village Overlay Zone the following additional standards apply for new development:
 - (A) Car wash is prohibited.
 - (B) Pump canopies must not exceed 35 feet in height.
 - (C) Any structure approved for the use must not exceed the scale and bulk of existing commercial structures in the village.

Conclusion: Not applicable.

C. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff reports and Petitioner's written evidence and testimony provide sufficient evidence that, with the recommended conditions of approval, the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions:

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:
 - (1) Is a permissible special exception in the zone.

Conclusion: An automobile filling station is a permitted special exception use in the C-1 Zone.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: With the recommended conditions of approval, the proposed modification would comply with the standards and requirements set forth for the use in Code §59-G-2.06, as detailed in Part IV.B. above.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: As discussed in Part II.C., the evidence supports the conclusion that the proposed modification would be consistent with the *1985 Gaithersburg Vicinity Master Plan*, which confirms the existing C-1 Zoning, permitting the use by special exception.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: With the recommended conditions of approval, the proposed modification would be in harmony with the general character of the neighborhood, considering the cited factors. There would be a minor increase in daytime population density. One other gas station has been identified in the general neighborhood, but the proposed modification would not change the total number of stations. Moreover, this neighborhood can absorb two gas stations in its mix of uses. The existing structures on the site would be replaced with newer, more attractive structures that would be consistent with the mixed commercial/residential character of the area. The property is located on the edge of a large C-1 commercial area, and the increased impacts of the higher traffic generation and increased activity levels would still be relatively modest compared with the adjacent Safeway shopping center. Petitioner contends that noise levels would decrease with the removal of the service bays, but there is no evidence in the record concerning the amount of noise generated by the car wash or the increased levels of vehicular traffic. The Hearing Examiner does not reach a conclusion as to whether noise levels would increase or decrease, finding that the noise would be sufficiently mitigated by the retaining walls and other screening along the side property lines, and by the Safeway building to the north.

Petitioner seeks a waiver of two Zoning Ordinance requirements pertaining to its parking proposal: (1) a waiver to permit a side setback on the west side of the property of eight feet, rather than the 12 feet normally required under Section 58-E-2.81; and (2) a waiver to permit the modification to proceed with 17 parking spaces on site instead of the 18 spaces that would normally be required under Section 59-E-3.7. The Board of Appeals is authorized under Section 59-E-4.5 to waive any requirement of Chapter 59-E that is “not necessary to accomplish the objectives in Section 59-E-4.2.”

Those objectives are set forth below, together with the Hearing Examiner's analysis of whether each would be satisfied under the parking plan proposed in this case:

Sec. 59-E-4.2. Parking facilities plan objectives.

A parking facility plan shall accomplish the following objectives:

- (a) The protection of the health, safety and welfare of those who use any adjoining land or public road that abuts a parking facility. Such protection shall include, but shall not be limited to, the reasonable control of noise, glare or reflection from automobiles, automobile lights, parking lot lighting and automobile fumes by use of perimeter landscaping, planting, walls, fences or other natural features or improvements.

Conclusion: The proposed parking consists of 11 spaces across the front of the convenience store, perpendicular to the building, plus three parallel parking spaces along each side of the site. The parking spaces in front of the convenience store would be set back approximately 25 feet from the side property lines and would be screened by retaining walls topped with screen fences and landscaping, making adverse impacts very unlikely. The parallel parking spaces would be close to the side property lines, but would be screened by the solid wall or fence required under the recommended conditions of approval, as well as the evergreens shown on the submitted plans. All of the parking spaces would be set back sufficiently from the roadway so as to avoid any adverse impacts on drivers using the road. Accordingly, the Hearing Examiner concludes that the side setback waiver would not impede the accomplishment of objective (a).

The Hearing Examiner agrees with Technical Staff's conclusion that 17 spaces would be adequate for the use. First, a modern, automated car wash does not generate a need for customer parking spaces because vehicles do not park, they line up in front of the tunnel. Thus, a partial waiver of the requirement for two spaces per car wash bay would likely have no adverse impact. Second, if parking were at times insufficient to accommodate all the drivers seeking to park to use the convenience store, or the vacuums and air pump, the likely outcomes would not impose adverse effects on the neighborhood. There are no residential streets in the immediate vicinity that could draw overflow parking, and even the adjacent Safeway parking lot would be inconvenient because it is located to the east, and drivers are restricted to turning west when they leave the subject site. Thus, the likely

outcome of any parking shortage is simply that drivers would forego a trip to the convenience store or other facilities on site. Accordingly, the Hearing Examiner concludes that approving 17 parking spaces instead of 18 would not impede the accomplishment of objective (a).

(b) The safety of pedestrians and motorists within a parking facility.

Conclusion: The evidence supports a conclusion that the safety of pedestrians and motorists in maneuvering onto the site, parking, entering the buildings and exiting the site safely would not be impeded by the reduced side setback or the reduced number of parking spaces. To the contrary, the waivers are necessary in part to ensure adequate space for safe circulation onto and within the site.

(c) The optimum safe circulation of traffic within the parking facility and the proper location of entrances and exits to public roads so as to reduce or prevent traffic congestion.

Conclusion: Objective (c) will be met by allowing vehicles to enter the subject site from the two existing entrances.

(d) The provision of appropriate lighting, if the parking is to be used after dark.

Conclusion: Appropriate lighting will be provided.

(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions of approval, the proposed modification would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

(6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions, the proposed modification would cause no objectionable noise, vibrations, fumes, odors,

dust, illumination, glare, or physical activity at the subject site. As discussed in Parts IV.A. and B., the impacts of noise, fumes and physical activity would be mitigated by retaining walls, fencing and landscaping, and lighting impacts would be reduced.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: The proposed modification would not increase the number of special exception uses in the area. The evidence supports the conclusion that the proposed modification would not increase the intensity or scope of special exception uses sufficiently to affect the area adversely or alter its predominantly mixed commercial/residential nature.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions, the proposed modification would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

Conclusion: The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities with the proposed modification.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of granting the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: Subdivision approval would not be required as a condition of approval of the special exception. As discussed in more detail in Parts IV.A. and B., the Hearing Examiner finds, based on the preponderance of the record, that the proposed modification would have only a de minimus adverse effect on traffic conditions in the general neighborhood, and that the proposed extra impact fee payment would satisfy the requirements of LATR. Policy Area Transportation Review does not apply, per the current Growth Policy.

- (2) With regard to findings relating to public roads, the Board . . . must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: The evidence supports a conclusion that the proposed modification, with the recommended conditions, would have no detrimental effect on vehicular or pedestrian safety. The two site entrances would not change, nor would their right-turn-only restriction be lifted. The site has been designed with adequate maneuvering space for customers using each of the services to be available on site. In addition, there was no evidence to suggest that the increase in traffic, although substantial, would create dangerous conditions for pedestrians, who have traffic lights and crosswalks available to them at the Safeway entrance/high school entrance and at nearby intersections.

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.

Conclusion: No finding necessary.

- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: The record substantiates a finding that the Petitioner has met the burden of proof and persuasion.

59-G-1.23 General Development Standards

Pursuant to Section 59-G-1.23, each special exception must comply with the development standards of the applicable zone where the special exception is located, applicable

parking requirements under Article 59-E, forest conservation requirements under Chapter 22A, and sign regulations under Article 59-F; must incorporate glare and spill light control devices to minimize glare and light trespass; and may not have lighting levels along the side and rear lot lines exceeding 0.1 foot candles. Furthermore, under Section 59-G-1.23(g), any structure constructed under a special exception in a residential zone “must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.” Under Section 59-G-1.26, a structure constructed pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted, and must have suitable landscaping, streetscaping, pedestrian circulation and screening.

As shown in the table on page 28, the proposed modification would satisfy all applicable development standards except for the number of parking spaces and the side parking setback on the west side of the site. As discussed in more detail in Part IV.B., the Hearing Examiner concludes, based on the undisputed evidence, that the requested waivers of one parking space and four feet of side setback should be granted. The site has an exemption from forest conservation requirements. There is no evidence to suggest that the proposed monument sign, which is smaller than the existing pole sign, would violate Article 59-F. A recommended condition of approval would require compliance with Article 59-F. All exterior lighting would incorporate glare and spill light control devices that currently are not present on the site, and which would reduce the off-site impacts of existing lighting. As discussed in more detail in Part II.E, the Hearing Examiner recommends that the Board of Appeals approve the proposed lighting to preserve public safety, despite an illumination level of 0.2 foot-candles just over the western property line at one location. The subject property is not within a residential zone. Moreover, the proposed structures would be consistent with other commercial structures in the immediate area, and the proposed site plan includes extensive screening and landscaping.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. CBA 2740-A, which seeks to modify an existing special exception for a gasoline fueling station to permit a replacement of all fixtures and structures on the site, including increasing the number of pumping stations and employees, expanding the size and hours of the convenience store, eliminating the service bays and adding a car wash, be **granted** with the following conditions:

1. Petitioner shall be bound by all of its testimony and exhibits of record, including the site plan and landscape plan to be submitted pursuant to Condition 3 below, the submitted Lighting Plan and Details, Exhibit 44(c), and the Master Site Plan, Ex. 9(a), and by the testimony of its witnesses and representations of counsel identified in this report.
2. All terms and conditions of the approved special exception shall remain in full force and effect, except as specifically amended by this modification.
3. Before the modification may take effect, Petitioner shall submit a site plan and a landscape plan that have been revised to clearly depict a solid wall or a substantial, slightly, solid fence, not less than 5 feet in height, together with a 3-foot planting strip on the outside of such wall or fence, to be planted in shrubs and evergreens, along the portion of the western property line not screened by the proposed retaining wall. In addition, the word "Preliminary" shall be removed from the title of the landscape plan.
4. The total square footage of the convenience store and the car wash building may not exceed 4,549 square feet.
5. To mitigate adverse traffic impacts on the intersection of Riffle Ford Road and Darnestown Road, Petitioner must make an additional payment equal to 50 percent

of the applicable transportation impact tax before the issuance of any building permit associated with this modification.

6. The special exception shall be limited to a total of seven employees, with no more than three on site at any one time.
7. Hours of operation will be limited to 6:00 a.m. to midnight, seven days a week, for the gas station and convenience store, and 7:00 a.m. to 8:00 p.m. for the car wash.
8. Petitioner must comply with applicable Montgomery County stormwater management regulations.
9. Signage on the subject site shall comply with the Montgomery County Sign Ordinance, Article 59-F of the Montgomery County Code.
10. No fluttering banners, pennants, spindles or other similar objects shall be displayed on the subject site. No sales or advertising signs shall be attached to the light standards or the monument sign.
11. No vehicle repair work, including painting, body work or fender repair, is permitted on the subject site.
12. All storage shall take place inside the convenience store or car wash building.
13. No vehicle rental activity may take place on site, nor may vehicles or trailers be stored on the site.
14. Trash must not be allowed to accumulate on site, and must be disposed of at regular intervals.
15. Driveways must be no wider than 30 feet.

Dated: August 3, 2007

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner